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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 129

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SYBIL WHITEHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 17, 1930
CERTIORARI GRANTED OCTOBER 13, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 129

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SYBIL WHITEHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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[Caption omitted]

Before U. S. Board of Tax Appeals

Docket 13220

SYBIL WHITEHOUSE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For the taxpayer: F. R. Coudert, Esq., Thos. Kelly, Esq., Blount Ralls, Esq., R. W. Candler, Esq., S. D. Bowers, Esq.
For the commissioner: T. P. Dudley, Esq., A. H. Murray, Esq.

Docket entries

1926
April 8—Petition received & filed.
" 12—Copy of petition served on solicitor.
" 12—Notification of receipt mailed taxpayer.
June 7—Answer filed by solicitor.
July 20—Copy of answer served on taxpayer. General calendar.
2 Nov. 15—Stipulation for hearing with 6243 & 10644 filed.
" 24—Stipulation that depositions of R. W. Candler & Rowland E. Cocks, filed in #6243, be used in above appeal filed.
Dec. 1—Hearing had before Mr. Milliken on merits. Briefs due 1-15-27.
" 30—Transcript of hearing 12-1-26 filed.
1927
Jan. 5—Motion for extension to 2-15-27 to file brief filed by taxpayer. See 6243.
" 11—Ordered, date for filing briefs be extended to 2-15-27 signed & filed. Both sides notified.
" 15—Motion for extension to 2-15-27 to file brief filed by G. C.
" 20—Granted. Both sides notified. See 6243.
Feb. 12—Brief filed by taxpayer.
" 15—Motion for extension to 3-17-27 to file brief filed by G. C.
" 17—Granted. Both sides notified.
Mar. 16—Motion for extension to 4-16-27 to file brief filed by G. C.
" 18—Granted. Both sides notified.
April 14—Motion for extension to 6-1-27 to file brief filed by G. C.
" 15—Granted. Both sides notified.
June 1—Brief filed by G. C. See 6243.

Docket entries—Continued

1927

July 8—Findings of fact & opinion rendered. Judgment will be entered on 15 days' notice, §50. Both sides notified.

Aug. 22—Notice of settlement filed by G. C.

" 24—Notice allowing taxpayer until 10-3-27 to file alternative settlement for hearing 10-20-27. Failure to do so, hearing set 10-12-27.

Oct. 12—Hearing had before Mr. Littleton on settlement.

3 Assigned to Mr. Milliken for order of redetermination.

" 13—Order & Decision redetermining deficiency signed & filed. Both sides notified.

1928

April 7—Petition for review by U. S. Cir. Ct. of Appeals, 1st Circuit, with assignments of error, filed by G. C.

" 13—Proof of service filed. Spotswood D. Bowers.

" 16—Proof of service filed. Sybil Whitehouse.

June 1—Motion for extension to 7-8-28 for preparation of evidence & transmission & delivery of documents filed by G. C.

" 6—Order granting extension to 7-8-28 for preparation of evidence & delivery of records to 1st Circuit entered.

" 26—Præcipe filed by G. C.

" 26—Statement of evidence lodged by G. C.

" 26—Motion for extension to 7-28-28 for preparation of evidence & settlement of record filed by G. C.

" 29—Hearing date changed to 7-11-28 for approval of statement of evidence.

" 29—Order enlarging time to 7-28-28 for preparation of evidence & transmission & delivery of record papers sur petition entered.

July 2—Proof of service of præcipe & statement of evidence for hearing 7-10-18 on settlement of record filed by G. C.

" 7—Order enlarging time to 8-8-28 entered.

" 11—Hearing had before Mr. Green. Continued to 8-8-28 for approval of statement of evidence.

" 11—Order placing on calendar of 8-8-28 for hearing on approval of statement of evidence entered.

July 24—Order enlarging time to 8-22-28 for preparation of

4 evidence & transmission of records sur petition entered.

Aug. 8—Hearing had before Mr. Sternhagen on statement of evidence. Continued to 8-2-28; 10 days additional to submit record.

" 8—Order motion to continue to 8-22-28 for hearing on approval of statement of evidence granted, entered.

" 13—Order enlarging time to 9-1-28 for filing certified copies of record papers sur petition for review entered.

" 22—Motion to enlarge time to 9-22-28 filed by G. C.

" 22—Order enlarging time to 9-22-28 entered.

Docket entries—Continued

928

t. 21—Statement of evidence approved & ordered filed.
21—Order enlarging time to 10–8–28 for filing certified copies of record papers sur petition for review entered.

Now, October 4, 1928, the foregoing docket entries certified from record as a true copy.

SEAL.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Petition

Filed April 8, 1926

The above-named taxpayer hereby petitions for a redetermination the deficiency tax imposed by the Commissioner of Internal venue set forth in his deficiency letter dated February 10, 1926 mbols IT:PA–1–60D, PBM–104) and as the basis of her petition s forth the following:

1. The taxpayer is a resident of the city of Newport, State of Rhode and, and her principal place of business is at Stone Villa, Newport, R. I.

2. That the said deficiency letter was mailed to the taxpayer on the 10th day of February, 1926, copy of which is hereto ached and marked "Exhibit A."

3. That the taxes in controversy are income taxes for the calendar ar 1921, and the deficiency claimed is less than $10,000, to wit, 20.79.

4. The determination of tax contained in said deficiency is based on the following errors:

(a) That the commissioner erroneously proposes to make an assment against the taxpayer by reason of the fact that she received annuity of $5,000 under the will of the late James Gordon Bentt, which she failed to report as taxable income.

(b) The Commissioner of Internal Revenue erroneously claims at periodical payments of an annuity created by the will of a ceased person are taxable income in full to the annuitant, a distinon being recognized by the bureau between the value of the right receive an annuity, which is the property which passes by bequest, d the actual annual payments to the annuitant growing out of this ght, which are, it is claimed, income.

5. The facts upon which the taxpayer relies as the basis of her peal are as follows:

(a) James Gordon Bennett, a citizen of the United States of merica and resident of the State of New York, died in the Republic France on May 14, 1912, leaving a last will and testament dated ovember 11, 1910.

(b) The said last will and testament was duly admitted to probate by the surrogate's court in and for the county of New York, State of New York, to whom jurisdiction in that behalf belonged on September 27, 1919.

(c) Rodman Wanamaker and Guaranty Trust Company of New York are the duly qualified and acting executors of said last will and testament.

6 4. The said last will and testament contains the following provision:

"Tenth. I also give and bequeath to the said Sybel [sic] Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

By the twenty-ninth clause of his will the said decedent directed the incorporation by his executors of a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists," the purpose of which is to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years on any daily newspaper or journal then or thereafter published in the Borough of Manhattan, in the city of New York, and who are unable to care for themselves, or need such home or aid, and he gave all the residue of his estate to said corporation. Said decedent further provided by the thirtieth clause of his will as follows:

"For the purpose of paying any legacy or legacies or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lieu or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto.

7 "I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

(e) The corporation above referred to, viz, The James Gordon Bennett Memorial Home for New York Journalists Corporation, was duly incorporated and is a charitable corporation incorporated under the laws of the State of New York, with the approval of the State

board of charities, in May, 1919, and is now existing under the laws of the State of New York.

(f) No trust or fund was directed by the said will to be or has been set up by the said executors of the said will of James Gordon Bennett to provide for the payment of the bequest, legacy, or annuity to said taxpayer under the fifth clause of said will.

(g) The taxpayer in compiling her income-tax return, Form 1040, for the year 1920 set forth that she had paid in 1921 the sum of $5,000 on account of her annuity was a legacy and not advised by counsel that said annuity was a legacy and not income taxable to her.

6. The taxpayer in support of her appeal relies upon the following propositions of law:

(a) That the said annuity of $5,000 paid by said executors to the taxpayer in 1921 was or is property acquired by bequest and as such was and is not taxable as income.

(b) The gift, bequest, or legacy set forth in the tenth clause of said will was not and is not a gift of income, nor was nor is the sum or sums paid by the executors to the taxpayer for such annuity nor any part thereof income which is subject to taxation.

8 (c) The annuity mentioned in the tenth clause of said will is a bequest or legacy payable in instalments and as such was not and is not taxable as income.

(d) The said bequest or legacy does not constitute a trust the income of which is distributed periodically, and it does not fall within the terms of section 345 of Regulations 62, nor within the terms of the revenue act of 1921.

(e) The gift, bequest, legacy, or annuity contained in the tenth clause of said will is, when and as received by said taxpayer, principal and not income, and is not subject to tax under the sixteenth amendment of the Constitution of the United States, and any tax or attempt to tax such gift, bequest, legacy, or annuity is and will be unconstitutional and void and in violation of sections eight and nine of Article I of said Constitution.

(f) The fact that said executors may pay said gift, bequest, legacy, or annuity from funds in their hands partly or wholly derived from income collected by them on the assets of the estate does not thereby alter the nature of said gift, bequest, or legacy, nor render it or any part thereof income in the hands of the taxpayer.

On information and belief petitioner further alleges that in the year 1921 the estate of James Gordon Bennett paid to the State of New York, as transfer tax in behalf of petitioner due upon said annuity of $5,000 a year, the sum of $4,125.74, and in the same year paid in behalf of petitioner, on account of the inheritance tax on the right to receive said annuity of $5,000, to the State of Rhode Island the sum of $3,670.36; and the said estate also paid to the State of New Jersey, as an inheritance tax in behalf of petitioner upon said annuity of $5,000 a year, the sum of $1,347.55. Petitioner further

alleges that under the income-tax law in force at the time said payments were made all of said payments were properly deductible from the income of the petitioner for the year 1921. Petitioner further avers that, through failures to receive information from the estate of James Gordon Bennett prior to the filing of her income-tax return for said year, she failed to take a deduction for said sums on her income-tax return for said year 1921, and petitioner avers that upon the re-determination of the deficiency tax imposed by the Commissioner of Internal Revenue, referred to hereinbefore, that said items should be considered by this board and deducted from the taxable income of petitioner for said year 1921.

Wherefore the taxpayer respectfully prays that this board may hear and determine this appeal and that it be adjudged that the said deficiency tax is unwarranted in law, and that the same be entirely set aside.

SPOTSWOOD D. BOWERS,
Counsel for Taxpayer,
46 Cedar Street, New York, N. Y.

[*Duly sworn to by Edith S. Whitehouse; jurat omitted in printing.*]

Exhibit A to petition

Form NP-2

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 10, 1926.

IT:PA-1-60D, PBM-104.
MRS. SYBIL WHITEHOUSE,
Stone Villa, Newport, Rhode Island.

MADAM: The determination of your income-tax liability for the year 1921 discloses a deficiency in tax amounting to $920.79.

In accordance with the provisions of section 274 of the revenue act of 1924 you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement con-

senting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA-1-60D, PBM-104. In the event that
11 you acquiesce in a part of the determination the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner.*
By C. R. NASH,
Assistant to the Commissioner.

Inclosures: Statements; agreement, Form A; Form 882.
Form 7861, revised May, 1925. 2-13281.

IT:PA:1-60D, PBM-104.

FEB. 10, 1926.

STATEMENT

In re: Mrs. Sybil Whitehouse, Stone Villa, Newport, Rhode Island. 1921, deficiency in tax, $920.79.

You report the receipt of $5,000.00 representing an annuity payable out of the income of the estate of James Gordon Bennett. This income was not included for taxation.

Section 213 of the revenue act of 1921 provides:

"That for the purpose of this title the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of the interest in such property; also from interest, rents, dividends, securities, or the transaction of any business carried on for gain or profit; or gains or profits, and income derived from any source whatever."

In accordance with the above this annuity of $5,000.00 has been included in your net income and is subject to normal tax of 8%, or $400.00, and surtax as follows:

12

$640.50 at 9%	$57.65
$2,000.00 at 10%	200.00
$2,000.00 at 11%	220.00
$359.50 at 12%	43.14
Additional surtax	520.79
Additional normal tax:	400.00
Total deficiency	920.79

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1921, the bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3708 to discuss your case before mailing formal notice of its determination as provided by section 274

(a) of the revenue act of 1924. It is necessary at this time, in order to protect the interests of the Government, either to make an immediate assessment under the provisions of section 274 (d) of the revenue act of 1924 or to issue a formal notice of deficiency. Therefore the bureau has elected to issue this notice of deficiency, believing it will be more satisfactory than an immediate assessment.

Payment of the tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Before United States Board of Tax Appeals

Answer

Filed June 7, 1926

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations in said paragraph of the petition.

13 2. Admits the allegations in said paragraph of the petition.

3. Admits the allegations in said paragraph of the petition.

5 (a), (b), and (c). Admits that James Gordon Bennett died leaving a last will and testament which was duly admitted to probate in the State of New York, and that the estate of said decedent was administered under said will.

5 (d). Admits that the said will of said decedent bequeathed to the taxpayer an annuity of $5,000.00. For want of knowledge or information sufficient to form a belief neither admits nor denies the other allegations of said paragraph of the petition, but calls for proof thereof.

5 (e) and (f). For want of knowledge or information sufficient to form a belief neither admits nor denies the allegations of said paragraph of the petition, but calls for proof thereof.

5 (g). Admits the allegations in said paragraph of the petition.

Wherefore it is prayed that the appeal of the above-named taxpayer be denied.

A. W. Gregg,
General Counsel, Bureau of Internal Revenue.

Of counsel:
Thomas P. Dudley, Jr.,
Special Attorney, Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing answer certified from the record as a true copy.

[SEAL.] B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

14 Before United States Board of Tax Appeals

Docket Nos. 6243, 10644, 13220. Promulgated July 8, 1927.

RONALD DE REUTER, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

HENRIETTA D'ARAMON, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SYBIL WHITEHOUSE, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Where the testator bequeathed to petitioner an annuity and where his will contained no direction to pay the annuity out of the income of his estate, held, that the moneys received by petitioner as payments of his annuity is exempt from income tax, under the provisions of section 213 (b) (3) of the revenue act of 1921.

Frederick R. Coudert, Esq., Thomas Kelly, Esq., Blount Ralls, Esq., Robert W. Candler, Esq., and S. D. Bowers, Esq., for the petitioners.

Thomas P. Dudley, jr., Esq., for the respondent.

The above proceedings were, by agreement, consolidated and heard together and involve deficiencies in income tax in the case of Ronald de Reuter, for the calendar year 1923, in the sum of $1,470; in the case of Henrietta d'Aramon, for the calendar year 1923, in the sum of $630; and in the case of Sybil Whitehouse, for the calendar year 1921, in the sum of $920.79. These deficiencies arise by reason of the fact that the commissioner included in gross income for each petitioner a certain annuity bequeathed to petitioner by the will of James Gordon Bennett. Petitioner Sybil Whitehouse further contends that the commissioner erred in not permitting the deduc-
15 tion of certain death taxes paid by the estate of James Gordon Bennett to the States of New York, New Jersey, and Rhode Island. In a brief filed in behalf of said petitioner this last contention has been withdrawn.

FINDINGS OF FACT

The petitioner Ronald de Reuter is a nonresident alien, a citizen of France, and resides at 37 Avenue d'Iona, Paris, France. Petitioner Henrietta D'Aramon is a nonresident alien, a citizen of France, resident at No. 1 Boulevard La Tour, Maubourg, Paris, France. Petitioner Sybil Whitehouse is a resident of the city of Newport, Rhode Island, and her principal place of business is at Stone Villa, Newport, Rhode Island.

James Gordon Bennett, a citizen of the United States, and a resident of the State of New York, died in the Republic of France, May 24, 1918, leaving a last will and testament, the material portions of which are:

"Third. I give and bequeath to my wife Maud an annuity of fifty thousand dollars, to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death, and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

"Fourth. I give and bequeath unto my sister Jeanette Bell the sum of fifty thousand dollars and make no further provision for her because she is already amply provided for.

"Fifth. I give and bequeath unto my nephew Isaac Bell an annuity of thirty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

"Sixth. I give and bequeath to my niece Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand
16 dollars, to be paid to her personally, and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

"Seventh. I give and bequeath to my niece Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars, to be paid to her personally, and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

"Eighth. I give and bequeath to my step-son Ronald de Reuter an annuity of twenty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

"Ninth. I give and device absolutely, and in fee simple, to Sybil Douglas, wife of William Whitehouse, my cottage, or Stone Villa, consisting of a parcel of land and buildings thereon, situated at Newport, in the State of Rhode Island, known as "Stone Villa," to have and to hold the same to her, her heirs, and assigns forever; and if during my life I shall sell the said cottage, then and in such case I give and bequeath unto the said Sybil Douglas, wife of William Whitehouse, a sum equal to the amount for which I shall have sold the said cottage.

"Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

By the eleventh to twenty-fifth clauses, inclusive, the testator bequeaths annuities ranging from $500 to $5,000 to various persons. Then follows:

"All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semi-annual reckoning from the time of my death.

"Twenty-sixth. I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

17 "Twenty-ninth. It is my long-cherished intention and purpose and it is my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the New York Herald, and therefore to that end and to effectuate my said intention and purpose I dir[illegible] the executors of this my will, hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists" in memory of my father and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the Borough of Manhattan, in the city of New York, and who shall, by reason of old age, accident, or bodily infirmity, and through lack of means, be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval, and acceptance of persons to receive the benefits of such home or such aid, give the preference to any person who shall be or shall have been employed by or associated with the New York Herald Company or the New York Herald Company Societe Anonyme Francaise upon or in connection with either the New York or the European edition of the New York Herald newspaper or the Evening Telegram news-

18 paper. The said memorial home corporation shall establish and maintain a suitable building or suitable buildings and grounds and appurtenances to provide a home or homes for the persons so to be benefited or aided and may also aid any such person or persons by pecuniary or other contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise, and bequeath all the rest, residue, and remainder of all the estate and property, real and personal and of every kind and nature and wheresoever situ-

ated, which shall belong to me or be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such home corporation shall be so duly incorporated and entitled to receive such residuary estate and property I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such memorial home corporation shall own and as soon as the due administration of my estate shall permit receive and that it shall hold as long as practicable all capital stock of the New York Herald Company and the New York Herald Company Societe Anonyme Francaise which shall belong to me at my death and form part of my residuary estate and property, and that by virtue of its ownership of such stock it shall from time to time elect such persons as directors of said the New York Herald Company and said the New York Herald Company Societe Anonyme Francaise as shall continue to manage each of said companies and conduct the business and publication and management of the New York Herald newspaper in both its New York and European editions and the Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable as the same shall be conducted at the time of my death. It is also my wish and hope and I request that the directors of said New York Herald corporations shall so
19 manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations, or either of them, as shall provide reserve or surplus funds sufficient, in their judgment, to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will, hereafter named, and each persons who may at any time be an executor of my will, shall be and act as a director of such memorial home corporation and a director of each of said corporations, the New York Herald Company and the New York Herald Company Societe Anonyme Francaise. It is also my will and I direct that each executor of this my will who shall act as a director of such memorial home corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in ad-

dition to any commissions or compensations which he may receive or be entitled to for his service as an executor of this will.

"Thirtieth. I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executor of this my will and that each such executor may be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of
20 this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignn ents, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto. I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of the New York Herald Company or the New York Herald Company Societe Anonyme Francaise unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said memorial home corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will."

All the annuities involved in these proceedings, to wit, those paid the petitioners Ronald de Reuter and Henrietta d'Aramon in the year 1923, and to Sybil Whitehouse in the year 1921, were paid by executors of the will of James Gordon Bennett out of the income of the estate. In November, 1921, the executors of the will of James Gordon Bennett filed in the surrogate's court for the county of New York, State of New York, an intermediate account of settlement which was thereafter approved by said court. That account showed that all of the annuities herein involved were, prior to
21 November 14, 1920, paid out of the corpus of the estate, and all such annuities were, on and after November 14, 1920, paid out of the income of the estate. The total amount of the annuities payable in 1920 was $144,000. The account of settlement shows that the

executors, on December 30, 1920, permanently set aside to James Gordon Bennett Memorial Home for New York Journalists Corporation, which was organized under the laws of New York in May, 1919, the residuary devisee and legatee under said will, but subject to taxes, annuities, and other charges, the following assets:

Promissory notes of Frank A. Munsey Co.	$2,000,000.00
Bonds and mortgages on Fort Washington property, balance of principal due thereon	1,097,990.00
Bond and mortgage of Norman Countryman, balance of principal due thereon	450.00
$34,900 U. S. Victory loan bonds, amount invested therein	34,741.24
Balance of cash uninvested	78.76
Total	3,133,260.00

OPINION

MILLIKEN: In view of the conclusion which we have reached, we find it necessary to discuss but one question and that is, whether the annuities received by the petitioners under the will of James Gordon Bennett constitute income which is taxable by reason of the provisions of the revenue act of 1921. The applicable provisions of that act are:

"SEC. 213. That for the purpose of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title:

. . . . . .

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income) . . .

"SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdi-
23 vision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

The question presented is whether the annuity received by each of the petitioners was a "bequest" which was exempt from income tax under section 213, or constituted distributive income which was taxable under section 219. This question depends upon the construction of the will of James Gordon Bennett. The seventh, eighth, and tenth clauses of that will bequeathed to the respective petitioners "an annuity." No limit is placed upon the payment of these annuities. The only direction is that they be paid. The whole estate is charged with their payment. The only way in which any part of the estate can be freed from this charge is found in
the thirtieth clause, where the executors are given the power
24 to convert property into money and where it is provided that the property "so sold, conveyed, * * * or exchanged

shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto." It is to be noted, however, that this very power of sale or conversion is given to the executors for, among other purposes, the payment of the annuities. So that while the property sold is free of the charge, it is clear that the proceeds remain subject to the payment of the annuities.

Respondent invites our attention to the following excerpt from the thirtieth clause.

"I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

Giving this provision its broadest construction, it is apparent that there is nothing therein to the effect that any annuity is payable out of the income of the personality so to be set apart. If such fund, if created, should fail, it is our opinion that the remaining corpus of the estate would remain liable for the satisfaction of the annuities. In those cases where it was the clear intention of a testator that an annuity should be paid out of income or out of a particular fund, such intention must be given full effect. (See Delaney v. Van Aulen, 84 N. Y. 16, and Irwin v. Wollport, 128 Ill. 527; 21 N. E. 501.) On the other hand, where an annuity is given without limitation and the will merely indicates that the annuity may be paid out of income, the corpus is liable when the income becomes insufficient. Thus it was said by Judge Donio in Pierrpont v. Edwards, 25 N. Y. 128:

"The only question which I think it necessary to consider, in this case, is whether the bequest of the annuity of $7,000
25 a year, to the testator's wife, was specific, in the sense that if it could not be paid out of the fund indicated—namely, the income of the trust estate—it was to fail, or to abate, in proportion that the indicated fund should prove deficient; or on the other hand, whether it was intended by the testator that it should be paid; at all events the income of his property given to the trustees being pointed out by way, it is called, of demonstration. I am of opinion that the last mentioned construction is the one which we are bound to place upon the instrument, * * * The leading principle of the cases is that when the testator bequeaths a sum of money, or which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund. (Sir James Wigram in Dickin v. Edwards, 4 Hare. 273.)"

Reading the will of James Gordon Bennett as a whole, it at once becomes apparent that the annuities which it bequeaths are charges upon its whole estate, income, personalty and realty. The James

Gordon Bennett Memorial Home is a residuary legatee and devisee, and gets only what may be left after the annuity charges are paid.

That the annuities provided by the will are in fact bequests seems clear. (See Pierrpont v. Edwards, supra; Clark v. Clark, 147 N. Y. 639; 42 N. E. 275; *Canal Bank* v. *Hudson*, 111 U. S. 66; 3 C. J. 202.)

Are those annuities bequests of income within the meaning of section 219 or are they bequests as that term is used in section 213?

Long before the sixteenth amendment to the Constitution became effective a broad distinction had been drawn between a bequest of a pure annuity and a bequest of income. Thus it is said in section 2 of Chapter XIII of Remson on The Preparation and Contest of Wills (1907):

26 "An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount. "Annual taxes on principal are deducted from a use or income but not from annuities. * * *

"Where the testator sets aside a fund to provide for the payment of an annuity, his will should clearly indicate whether he intends the annuity to be a charge on the corpus or payable only out of the income. Thus under 'a clear gift of an annuity, a direction to set a fund apart to secure it, which is to fall into the residue upon the death of the annuitant,' the corpus is still liable to make good arrears. 'But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the corpus, and it is a simple case of tenant for life and remaindermen.' So, if it is clear that the annuity is to be paid only out of the income each year, or that the corpus is to be looked upon as an entirety after the annuitant's death, the corpus will not be liable for arrears. In the absence of an expressed intent to the contrary the testator's personal estate is primarily liable for the payment of an annuity. In some States it is provided by statute that if the funds or property out of which annuities are payable fails resort may be had to the general assets, as in case of a general legacy. Some testators provide for the purchase of annuities; some create a trust for their payment; others simply direct their payment out of the estate."

In Pock v. Kinney (C. C. A., 143 Fed. 76), it is said:

"There is this distinction between income and an annuity. The former embraces only the net profits after deducting all necessary expenses and charges; the latter is a fixed amount directed to be paid absolutely and without contingency. (Ex parte McComb, 4 Bradf. Sur. (N. Y.) 151, 152.) 'An annuity is defined as

27 "a stated sum, payable annually" Pearson v. Chase, 10 R. I. 455), or as "a yearly payment of a certain sum of money granted to another in fee, for life, or for years" (Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580; Bartlett v. Slater, 53 Conn. 102, 2

Atl. 678, 55 Am. Rep. 73.' (Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300.) It is a grant of a certain sum of money payable at the expiration of fixed, consecutive periods, for a definite term or for life. (Lumley's Law of Annuities, 1.)"

The court then quotes from the oft-cited case of Booth v. Ammerman (4th Bradford, 129). From the last case we make the following excerpt:

"An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount varying according to the income or profits, though a certain fund may be provided, out of which it is to be payable. * * * The income or interest of a certain fund is not an annuity, but simply profits of certain property, to be earned, which may vary more or less."

To the same effect see Dulaney v. Dulaney (105 Va. 429, 54 S. E. 40) and Overton v. Lea (106 Tenn. 505, 68 S. W. 250).

From the above, three things become apparent: (1) That each annuity herein involved is in fact a bequest, (2) that these annuities do not constitute bequests of income, and (3) that each annuity is a charge upon the whole estate.

Since no income, nor any share of income, has been bequeathed to any one of the petitioners, it can be held that such petitioner was entitled to a "distributive share of the income of the estate or trust," which is taxable under section 219. We can not see that the fact that the number of years during which a legacy is payable is determinable by the life of the beneficiary makes that income which otherwise is not income.

28 Respondent contends that these proceedings are governed by Irwin v. Gavit (268 U. S. 161) and Heiner v. Beatty (17 Fed. (2d) 743). In our opinion these cases are not in point. In the Gavit case there was a bequest of a certain share of income arising from a certain trust fund. In these proceedings we have no bequest of income, but a bequest of a sum certain, payable at all events each year so long as the legatee lives. In the Beatty case the testator, Carnegie, did bequeath an annuity but he made the annuity payable (in the case the executors did not purchase it from an insurance company) out of the income of a trust fund. The Circuit Court of Appeals reversed the decree of two judges of the lower court (10 Fed. (2) 390), holding the annuity exempt from income tax, but in so doing placed their decision squarely on the ground that the bequest was one of income from a trust. Thus the appellate court said:

"The first part of the Carnegie will with which we are concerned is the fifth article. It reads as follows:

"'Fifth. I give to each of the persons hereinafter in this fifth article named an annuity of the annual amount in this fifth article set after his or her name, to be paid semi-annually during the annuitant's life, that is to say, to * * * Mr. Beatty, art-dept., wife succeeding, five thousand dollars.'

"If the will had stopped there, it is possible the testator's provision for John W. Beatty would have been a bequest, payable in semi-annual installments directly from the estate, and all payments made to him year by year would have been exempt from taxation under paragraph 3 of subdivision (b) of section 213 of the cited act (Comp. St. §6336 1/8ff). However, the will did not stop there, but, going on, it provided in the very next article, by words whose significance we have emphasized by italics, as follows:

"'Sixth. I direct my executor and *trustee* either *to set apart, hold in trust, invest and keep invested, in separate funds, one for each annuitant*, sufficient sums to *produce* by the clear net interest and *income* thereof respectively, the several annuities provided in the fifth article of this will, * * * and to pay the said several annuities *from the* interest and *income of the respective funds* in semi-annual payments, or to purchase such annuities in life insurance companies. * * *'

"By the eighth article the testator authorized his executor and trustee (who is one corporate person), 'in its discretion, to retain for investment of the principal of any of the trusts, herein provided for, any of the securities left by me.' And, finally, by the same article he authorized the executor and trustee to sell any of the securities coming into its hands and reinvest the proceeds.

"Recapitulating, these provisions created, somewhat inartificially, yet, we think, with no lack of certainty, out-and-out trusts. They provided a capital sum for each annuitant, directed that it be 'set apart' and 'held in trust' for him and that from the interest and income therefrom accruing payment of a definite sum to be made to him semiannually. Having all the earmarks of formal trusts, the executor and trustee, believing itself charged therewith, exercised the election given it to create capital trust funds by withdrawing from the body of the estate sufficient securities to produce the amounts to be paid annually to the more than forty annuitants. For John W. Beatty it took, 'set apart,' and 'held in trust' one $100,000 United States Steel Corporation registered 50-year 5 per cent gold bond and two $5,000 bonds of the same issue, and of the interest received therefrom it paid him $5,000 a year. This is what was done. But the testator directed, in the alternative and at the trustee's election, another way by which the trustee could provide for the payment of the annuities, namely, by taking a part of the principal of the estate and with it buy annuities. Thus in both ways the testator willed that parts of the corpus of his estate be appropriated as capital sums from which income in amounts sufficient to pay the annuities could be obtained. In neither way—indeed, nowhere in the will—did he provide for payment of annuities from the principal of his estate. In other words, the testator, through alternative ways, specifically indicated and fully provided the sources of income to be paid the annuitants. What the will intended the annuitant here to receive and what actually he did receive was the income derived from a source which, we think, is sufficiently

definite to fall within the statute's denomination of 'income derived from any source whatever.'"

We look in vain for a provision in the Bennett will similar to that in the Carnegie will. We find no bequest of income.

Respondent cites Cummings' Executor v. Cummings (146 Mass. 301, 16 N. E. 401), to the effect that annuities such as those before us are payable primarily from income. The same would be true of any legacy, for no court would permit an executor to sell property to pay a legacy if he had income available. So also such a legacy is payable out of personalty rather than realty. All these are matters of administration with which annuitants have no concern.

Next it is contended that since the annuities were paid, in the taxable years involved, from income, the annuities constitute income. It may be noted that during the first two years after Bennett's death all the annuities herein involved were paid out of the corpus of the estate. The same, for all we know, may be done later. It is because certain testators have thought that they had ample means to pay annuities and their expectations have failed, that the cases which we have cited, have arisen. The fact that income is used to pay an obligation does not necessarily make what was income to the payer, income to the payee. The payment by one from his salary of borrowed money without interest does not make the money so paid income to the recipient. Neither would the payment of a simple legacy from income of an estate make the legacy taxable as income.

Respondent calls our attention to the language of Mr. Justice Holmes in Irwin v. Gavit, supra, where he states that if the income therein involved was not taxable, Congress "has missed so
81 much of the general purpose that it expresses at the start."

We have not before us the question of the extent to which the income of the estate of James Gordon Bennett is taxable, and express no opinion on that question. All we have before us is whether these annuities constitute taxable income in the hands of the beneficiaries. But even if our decision should result in this income becoming nontaxable at all events, we can only say that this results from the provisions of the law. The Supreme Court, construing the same act that was construed in the Gavit case, held in Smietanka v. First Trust & Savings Bank (257 U. S. 602), that income received by a trustee to be accumulated for unborn and unascertained beneficiaries was not taxable.

We are aware that the British courts have held that annuities similar to those here involved are subject to the British income tax, but in Merchants Loan & Trust Co. v. Smietanka (255 U. S. 509), it was said:

"The British income-tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved."

We have for application sections 213 and 219 of the revenue act of 1921. It is only by a strained construction that we can by any

possible means arrive at the conclusion that these annuities are taxable under section 219, to the petitioners, as distributive income. On the other hand, section 213 grants an exemption in cases of bequests. There is no doubt that each of these annuities is a bequest and there is no doubt that none of them is made payable by the will of James Gordon Bennett, out of income. To hold that the mere fact that in the taxable years involved, the annuities were paid out of income and therefore were distributive income to the recipients, would give a construction to the taxing statute far be-
32 yond the meaning of the words used. When we are compelled to chose between clear words of exemption and a strained construction of a taxing provision, we accept that which is clear rather than that which involves doubt.

Judgment will be entered on 15 days' notice, under rule 50.

A true copy. Teste.

B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

Dissenting opinion

Smith, dissenting: I perceive no valid distinction between this case and that of Irwin v. Gavit (268 U. S. 161). The case arose under the revenue act of 1918, which imposed an income tax upon income "arising or accruing from all sources" and included "the income from but not the value of property acquired by gift, bequest, devise, or descent." During the years 1913, 1914, and 1915 Gavit received the income from a certain fund as a bequest. The court held that it was liable to income tax and said:

"But we think that the provision of the act that exempts bequests assumes the *gift of a corpus* and contrasts it with the income arising from it, but was not intended to exempt income properly so called simply because of the severance between it and the principal fund * * *. The money was income in the hands of the trustees, and we know of nothing in the law that prevented its being paid and received as income by the donee." (Italics ours.)

If a gift of a corpus is the "bequest" that is not liable to income tax, then the petitioners in the case at bar did not receive a bequest. They simply received an annuity which, during the taxable year, was paid from the income of the estate. Clearly under section 219 (d) of the revenue act of 1921 the fiduciary making the estate income-tax return was entitled to deduct from gross income the amount of the annuity paid to each of the petitioners during the taxable year. Under the decision of the board neither the fiduciary nor the beneficiary can be held liable to income tax in respect of the income received.

33 Furthermore, under the decision of the court in Irwin v. Gavit, supra, the petitioners in the case at bar had an interest in the estate of the decedent and the income from that inter-

set is liable to income tax the same as the income which Gavit received in the above-cited case.

Now, October 4, 1928, the foregoing findings of fact, opinion, and dissenting opinion certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals

Before U. S. Board of Tax Appeals

Order and decision redetermining deficiency

Pursuant to the decision of the board promulgated July 8, 1927, in the above-entitled proceeding, the commissioner having filed a proposed final determination with notice of settlement and the petitioner having made no objection to such proposed determination, it is

Ordered, adjudged, and decided that there is no deficiency for the year 1921.

(Signed) B. H. LITTLETON,
Chairman, United States Board of Tax Appeals.

Dated, Washington, D. C., October 15, 1927.

Now, October 4, 1928, the foregoing order of redetermination certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Petition for review to the Circuit Court of Appeals for the First Circuit

Filed April 7, 1928

Now comes David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mabel Walker Willebrandt, Assistant
34 Attorney General, and C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows:

I. The petitioner on review (hereinafter referred to as the commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The commissioner is informed and believes and upon such information and belief avers that Sybil Whitehouse (hereinafter referred to as the taxpayer) is an inhabitant of the city of Newport, in the State of Rhode Island, and is an inhabitant of the judicial circuit of the Circuit Court of Appeals for the First Circuit.

II. The commissioner determined a deficiency against the taxpayer in income tax for the year 1921 in the amount of $920.79 and

on February 10, 1926, in accordance with the provisions of section 274 of the revenue act of 1924, sent to the taxpayer by registered mail a notice of said deficiency. The taxpayer on April 8, 1924, filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. In and by her said appeal the taxpayer alleged that the commissioner had erred in determining the deficiency aforesaid in that the commissioner determined that the sum of $5,000.00 paid to the taxpayer in 1921 by the executors of the will of James Gordon Bennett, pursuant to the tenth clause of said will, constituted taxable income to the taxpayer under the revenue act of 1921.

James Gordon Bennett, a citizen of the United States, and a resident of the State of New York, died on May 24, 1918, leaving a last will and testament, which was duly admitted to probate in the surrogate's court for the county of New York, State of New York. In any by the tenth paragraph of said will the testator gave and bequeathed to the taxpayer an annuity of $5,000.00, to be paid to her in equal semi-annual payments in each year during her life, reckoning the years from the date of the death of the testator.
35 In said will the testator also made bequests of annuities in various amounts to other individuals, all of the said bequests of annuities being of similar tenor and in similar terms except as to the respective amounts thereof to the bequest of the annuity to the taxpayer.

In the twenty-ninth paragraph of said will the testator directed the executors of the will to cause to be incorporated a corporation, to be known as The James Gordon Bennett Memorial Home for New York Journalists Corporation, which corporation should provide and maintain a home for indigent journalists, and in said paragraph the testator gave, devised, and bequeathed the entire residue of his estate to the said corporation to be formed. In the thirtieth paragraph of said will the testator authorized the executors of the will to sell or otherwise dispose of any real or personal property of the estate for the purpose of paying legacies, annuities, debts, and expenses and authorized said executors to retain and hold any personal property to provide for the payment of said annuities.

Up to November 14, 1920, all of the annuities provided for in said will were paid out of the corpus of the estate of said James Gordon Bennett. From and after said last mentioned date all of said annuities were paid by the said executors entirely out of the income from said estate, and the annuity of $5,000.00 paid to the taxpayer in 1921 was paid entirely out of said income. The said executors of the will of said James Gordon Bennett filed in the surrogate's court for the county of New York, State of New York, an intermediate account of their proceedings as such executors up to November 30, 1921, which account was thereafter approved by said court. In and by said account the said executors stated and showed, among other things, that on December 30, 1920, they, the said executors, per-

manently set aside certain bonds, mortgages and other securities, constituting a large part of the estate at the time, as part of the residuary estate and as the property of the said James Gordon Bennett
36 Memorial Home for New York Journalists Corporation, but under the control of the executors as security for the payment of taxes, annuities, or any other charges against the estate under the will and the income therefrom to be used for the payment of the annuities as far as may be necessary.

The hearing of this appeal of the taxpayer by the Board of Tax Appeals was held on December 1, 1926, which date was after the enactment of the revenue act of 1926. On July 8, 1927, the Board of Tax Appeals issued its findings of fact and opinion in said appeal, wherein and whereby the board held that the annuity paid to the taxpayer in 1921 under the said will was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921. On October 13, 1927, the Board of Tax Appeals entered a final order of redetermination in said appeal, wherein and whereby the board ordered and decided that there was no deficiency against the taxpayer for the year 1921.

III. The commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the commissioner, and the commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision, and final order of redetermination and upon which he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

(1) The board erred in holding that the annuity paid to the taxpayer in 1921 was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

(2) The board erred in not holding that the annuity paid to the taxpayer in 1921 was not exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

37 (3) The board erred in holding that the amount of the annuity paid to the taxpayer in 1921 constituted the value of property acquired by gift, bequest, devise, or descent within the meaning of section 213 (b) (3) of the revenue act of 1921.

(4) The board erred in not holding that the amount of annuity paid to the taxpayer in 1921 did not constitute the value of property acquired by gift, bequest, devise, or descent within the meaning of section 213 (b) (3) of the revenue act of 1921.

(5) The board erred in not holding that the annuity paid to the taxpayer in 1921 was required to be paid entirely out of the income from the estate of James Gordon Bennett.

(6) The board erred in not holding that the annuity paid to the taxpayer in 1921 constituted income of the estate of James Gordon Bennett during the period of administration or settlement of the

said estate, which income was properly paid to the taxpayer and was distributable to the taxpayer during the year 1921, pursuant to the instrument or order governing the distribution thereof, and that such annuity constituted taxable income to the taxpayer within the meaning and purview of paragraphs (c) and (d) of section 219 of the revenue act of 1921.

(7) The board erred in not holding that the annuity paid to the taxpayer in 1921 constituted income of the estate or trust created under the will of James Gordon Bennett, which income was, pursuant to the will or order governing the distribution thereof, distributable to the taxpayer in said year and that such annuity constituted taxable income to the taxpayer within the meaning and purview of paragraphs (a) (4), (d), and (e) of section 219 of the revenue act of 1921.

(8) The board erred in not finding as a fact that the securities of the estate of James Gordon Bennett, set aside by the executors on December 30, 1920, were so set aside upon the following, among other, terms and conditions, to wit: That the income from said securities was to be used for the payment of the annuities provided for in the will as far as might be necessary.

(9) The findings of fact made by the board are against the evidence.

(10) The findings of fact made by the board are not supported by the evidence.

(11) The decision of the board is not supported in law by the findings of fact made by the board.

(12) The decision of the board is not supported in law by the evidence.

(13) The board erred in redetermining that there is no deficiency in income tax against the taxpayer for the year 1921.

(14) The board erred in not redetermining that the deficiency against the taxpayer in income tax for the year 1921 was the amount determined by the commissioner.

IV. The commissioner, being aggrieved and prejudiced by the said decision and order of redetermination of the Board of Tax Appeals, desires to obtain a review thereof by the United States Circuit Court of Appeals for the First Circuit; wherefore he petitions that a transcript of the record be prepared in accordance with the rules of the Circuit Court of Appeals for the First Circuit and transmitted to the clerk of said court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court of Appeals for the First Circuit.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

30 [*Duly sworn to by C. M. Charest; jurat omitted in printing.*]

Before U. S. Board of Tax Appeals

Notice of petition for review

Filed Apr. 16, 1928

To SYBIL WHITEHOUSE,
Stone Villa, Newport, R. I.

Notice is hereby given to you that the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the 7th day of April, A. D. 1928, file with the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit of the decision rendered by said Board of Tax Appeals in said proceeding, a copy of which said petition for review as filed is herewith served upon you.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and of a copy of the petition for review mentioned in said notice is acknowledged this —— day of April, A. D., 1926.

SYBIL WHITEHOUSE.

40 Before U. S. Board of Tax Appeals

Notice of petition for review

Filed April 13, 1928

To SHERWOOD D. BOWERS, Esq.,
% Laughlin, Gerard, Bowers & Halpin,
57 William Street, New York, N. Y.
Attorney for Sybil Whitehouse, Respondent on Review.

Notice is hereby given to you that the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the 7th day of April, A. D., 1928, file with the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit of the decision rendered by said Board of Tax Appeals in said proceeding, a copy of which said petition for review as filed is herewith served upon you.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and a copy of the petition for review mentioned in said notice is acknowledged this 9th day of April,

A. D., 1928, by the undersigned attorney for Sybil Whitehouse, respondent on review in the above-entitled proceeding.

SHERWOOD D. BOWERS.

Now, October 4, 1928, the foregoing petition for review and notice of filing certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Statement of evidence

Lodged Jun. 26, 1928; Filed Sep. 21, 1928

The above-entitled appeal, together with the appeals of Ronald de Reuter, Docket No. 5243, and Henrietta d'Aramon,
41 Docket No. 10644, came on for hearing before the board on December 1, 1926, pursuant to written stipulation filed with the board by counsel for the parties in all three appeals. At the hearing it was stipulated between the counsel for all parties that the three appeals be consolidated for hearing and that the evidence in any appeal should apply as well to the others.

There was received in evidence the depositions of R. W. Candler and Rowland E. Cocks, witnesses on behalf of Ronald de Reuter, taken before Albert Gerber, a notary public in and for the county of New York, in the State of New York, which depositions were taken pursuant to order duly entered by the board.

The deposition of E. W. CANDLER was as follows:

Direct examination:

York city. I have a certified copy of the certificate of incorporation of the corporation known as The James Gordon Bennett Memorial Home for New York Journalists Corporation.

(There was received in evidence, as taxpayer's Exhibit 1, a copy, certified to be correct by the clerk of New York County, State of New York, and clerk of the Supreme Court, of the certificate of incorporation of The James Gordon Bennett Memorial for New York Journalists Corporation, which certificate of incorporation was signed and acknowledged by the incorporators of said corporation on May 10, 1919, approved by a justice of the Supreme Court of the State of New York on May 12, 1919, filed and recorded in the office of the secretary of the State of New York on May 16, 1919, and filed and recorded with the clerk of New York County, State of New York, on May 17, 1919, to which certificate of incorporation was attached an order of the State board of charities of the State of New York entered May 15, 1919, approving the incorporation of said The James Gordon Bennett Memorial Home for New York Journalists Corporation.)

42 Witness resuming:

I am secretary and treasurer and one of the directors of The James Gordon Bennett Memorial Home for New York Journalists Corporation. I have in my custody the minute book of the corporation, have transcribed or caused to be transcribed in that minute book all proceedings of the directors, and have attended the meetings of directors since its incorporation. The directors of the corporation have not taken any action, or adopted any resolution, for the dissolution of the corporation or the surrender of its charter. The minute book contains no record whatever of the dissolution or contemplated dissolution of the corporation, and the corporation is still actively in existence.

(There was no cross-examination.)

The deposition of ROWLAND E. COCKS was as follows:

I am personal trust officer of the Guaranty Trust Company of New York, which is one of the executors of the will of James Gordon Bennett. I am familiar with the proceedings of the Guaranty Trust Company as the executor of the James Gordon Bennett will and have followed the administration of the estate through since the appointment of this company as such executor in 1919.

The Guaranty Trust Company has the custody or possession of the securities belonging to the James Gordon Bennett estate. The funds or income of the estate pass through the accounts of the Guaranty Trust Company, and the company, as executor, keeps all the estate records, cash records, and security records. I am familiar with the accounts and records of the James Gordon Bennett estate. I now produce a certified copy of the will of James Gordon Bennett, dated November 11, 1916.

(There was received in evidence, as taxpayer's Exhibit 2, a copy of the will of James Gordon Bennett, certified to be a correct
43 copy under the seal of the surrogate's court of New York County, State of New York. The material provisions of the will were as follows:

Exhibit 2

I, James Gordon Bennett, a citizen of the United States of America, and of the State of New York, and a resident of number 37, West Forty-seventh Street, in the Borough of Manhattan, in the city of New York, hereby make, publish, and declare this to be my last will and testament, as follows:

First. I intend to leave at my death a will disposing of all my real and personal property situated in the Republic of France, and this will is not intended to in any way affect or dispose of any property situated in France disposed of by such other will, but it is my intention by this will to dispose of all property not disposed of by such will, which at the time of my death shall belong to me or be subject to my disposal by will.

. . . . . .

Third. I give and bequeath to my wife Maud an annuity of fifty thousand dollars, to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

Fourth. I give and bequeath unto my sister Jeanette Bell the sum of fifty thousand dollars and make no further provision for her because she is already amply provided for.

Fifth. I give and bequeath unto my nephew Isaac Bell an annuity of thirty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

Sixth. I give and bequeath to my niece Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

44 Seventh. I give and bequeath to my niece Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars, to be paid to her personally, and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

Eighth. I give and bequeath to my step-son Donald de Reuter an annuity of twenty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars.

(In and by the eleventh to the twenty-fifth clauses, inclusive, the testator gave and bequeathed to various individuals annuities of various amounts, each of said bequests being in the same terms, except as to names and amounts, as the bequest in the tenth paragraph.)

All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semi-annual payments, reckoning from the time of my death.

Twenty-sixth. I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

Twenty-seventh. Each devise, bequest, and annuity, given by the preceding articles of this my will, shall be over and above, and free from, any and all legacy, inheritance, or transfer tax or taxes, or duty or duties, and I direct that any and all such tax or taxes, duty or duties, upon or in respect of, or upon or in respect of the transfer of such devise, bequest, and annuity, shall be paid by my executors out of my estate, as part of the expense of administration thereof,

so that each devisee, legatee, and annuitant shall receive the full amount of each devise, bequest, or annuity hereby given to him or her, free from any such tax or duty.

Twenty-eighth. Each legacy or annuity hereby given to a woman now or hereafter married shall be for her own separate use, and not subject to the debts or control of her husband. Each such legacy and annuity shall be payable to the legatee or annuitant in person only, and on her or his personal receipt, and shall be inalienable, and not capable of anticipation, pledge or transfer, in whole or in part, by the legate or annuitant. All annuities hereby given shall commence at the time of my death and be payable in equal parts half-yearly, except as hereinabove specifically mentioned.

Twenty-ninth. It is my long-cherished intention and purpose and it my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the New York Herald, and therefore to that end and to effectuate my said intention and purpose I direct the executors of this my will, hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists" in memory of my father and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the Borough of Manhattan, in the city of New York, and who shall by reason of old age, accident, or bodily infirmity, and through lack of means, be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval, and acceptance of persons to receive the benefits of such home or such aid give the preference to any person who shall be or shall have been employed by or associated with the New York Herald Company or the New York Herald Company Societe Anonyme Francaise upon or in connection with either the New York or the European edition of the New York Herald newspaper or the Evening Telegram newspaper. The said memorial home corporation shall establish and maintain a suitable building or suitable buildings and grounds and

appurtenances to provide a home or homes for the persons so to be benefited or aided and may also aid any such persons or persons by pecuniary or either contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise, and bequeath all the rest, residue, and remainder of all the estate and property, real and personal and of every kind and nature and wheresoever situated which shall belong to me or be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such home corporation shall be so duly incorporated and entitled to receive such residuary estate and property I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such memorial home corporation shall and as soon as the due administration of my estate shall permit receive and that it shall hold as long as practicable all capital stock of the New York Herald Company and the New York Herald Company Societe Anonyme Francaise which shall belong to me at my death and form part of my residuary estate and property, and that by virtue
47 of its ownership of such stock it shall from time to time elect such persons as directors of said the New York Herald Company and said the New York Herald Company Societe Anonyme Francaise as shall continue to manage each of said companies and conduct the business and publication and management of the New York Herald newspaper in both its New York and European editions and the Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable as the same shall be conducted at the time of my death. It is also my wish and hope and I request that the directors of said New York Herald corporations shall so manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations or either of them as shall provide reserve or surplus funds sufficient in their judgment to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will hereafter named and each persons who may at any time be an executor of my will, shall be and act as a director of such memorial home corporation and a director of each of said

corporations the New York Herald Company and the New York Herald Company Societe Anonyme Francaise. It is also my will and I direct that each executor of this my will who shall act as a director of such memorial home corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in addition to any commissions or compensations which he may receive or be entitled to for his services as an executor of this will.

48 Thirtieth. I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executive of this my will and that each such executor may be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto. I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of the New York Herald Company or the New York Herald Company Societe Anonyme Francaise unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said memorial home corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will.

(Signed and witnessed on November 11, 1916.)

49 Witness resuming:

I am familiar with the terms of the will and with the eighth clause of the will by which the testator gave and bequeathed

to Ronald de Reuter an annuity of $20,000, to be paid in semi-annual payments during each year of his life. I know that the sum of $20,000 has been paid to Ronald de Reuter each year in accordance with that clause of the will. I know that the executors of the James Gordon Bennett estate have not set apart or constituted a separate trust or trust fund to produce or provide the sum of $20,000 a year to pay the annuity to Ronald de Reuter. The will of James Gordon Bennett did not appoint any trustees.

Cross-examination:

All of the securities which I testified were in the possession of the executor are held by the Guaranty Trust Company to pay not only this annuity but other annuities in the will. I am sure that the annuities for the year 1923 were paid out of the income from the securities in the possession of the executor.

Re-direct examination:

The executors are holding the securities and assets constituting the estate of James Gordon Bennett.

(There was received in evidence, as taxpayer's Exhibit 3, a copy, duly certified to be correct, of a decree or order entered on August 10, 1922, by the surrogate of New York County, approving and settling the intermediate account of the executors of the will of James Gordon Bennett down to and including the 30th day of November, 1921.)

Witness resuming:

The securities which I testified are at present held by the executors are held as set apart on their books for the residuary devisee and legatee, subject to the payment of taxes, annuities, and other charges, in the same manner as they were held in November, 1921.

50 (This concluded the deposition of Rowland E. Cocks.)

By agreement of counsel for all parties at the hearing, there was received in evidence, as an exhibit, a copy, duly certified to be correct, of the intermediate account of the executors of the will of James Gordon Bennett to November 30, 1921. The material portions of this account were as follows:

Exhibit in evidence

Summary

AS TO THE PRINCIPAL OF SAID ESTATE

The said executors charge themselves as follows:

With amount of—

Cash received from sales of real property, as shown by Schedule A, Part II	$753,697.18
Cash belonging to testator at the time of his death, as shown by Schedule A, Part III	7,071.38
Cash received from sale of personal property and as shown by Schedule A, Part IV	1,496,972.65
	2,259,741.41

And they ask to be credited as follows:
With amount of—

Expenses on sale of real property, as shown by Schedule B, Part I	$1,523,051.98	
Expenses of administration, as shown by Schedule B, Part II	202,757.37	
Payments to creditors, as shown by Schedule B, Part III	10,692.49	
Legacies paid, as shown by Schedule C, Part I	53,646.02	
Payments from principal on account of annuities, as shown by Schedule C, Part II	276,500.00	
51 Proceeds of mortgages reinvested, as shown by Schedule C, Part III	34,741.24	
		2,103,389.05
Leaving a cash balance of principal of		156,352.36

with which the said executors charge themselves as of November 30, 1921, the date to which this account is brought down.

AS TO THE INCOME OF THE SAID ESTATE

The said executors charge themselves as follows:
With amount of income received, as shown by—

Schedule A, Part II	$105,704.10
Schedule A, Part V	225,150.65
	330,854.75

And they asked to be credited as follows:
With the amount of—

Expenses, as shown by Schedule B, Part IV	$42,832.68	
Payments from income on account of annuities, as shown by Schedule C, Part II	209,175.31	
Payments on account of The James Gordon Bennett Memorial Home, as shown by Schedule C, Part IV	21,120.00	
		273,127.99
Leaving a cash balance of income of		57,726.76

with which the said executors charge themselves as of November 30, 1921.

52 SCHEDULE A, PART II

A statement of all real property mentioned in Schedule A, Part I, sold by said executors, the details of such sales, the moneys received therefore, including principal and interest received on purchase money, mortgages, and moneys received on installment contracts.

SUMMARY

	Purchase price	Cash paid	Original amount of bond and mortgage	Original amount of installment contracts	Balance due	Interest received
Fort Washington property	$1,722,900.00	$634,610.00	$1,189,750.00		$1,097,900.00	$105,897.85
Yonkers property	228,555.00	118,057.13	21,537.00	$86,076.50	141,051.87	74.20
Miscellaneous	11,900.00	10,650.00	600.00		450.00	32.05
Total	1,963,455.00	763,317.13	1,181,887.00	86,076.50	1,239,401.87	105,704.10

SCHEDULE A, PART V

A statement of all moneys received by said executors on account of income derived from said estate, including all rents from said real property and all interest, dividends, and other income received, except as set forth in Schedule A, Part II.

1918: Various items, aggregating $35.00.
1919: Various items, aggregating $956.86.
1920: Various items, aggregating $81,126.34.
1921: Various items, aggregating $143,032.45.
Total, $225,150.65.

53

SCHEDULE B, PART IV

A statement of all moneys paid from income of said estate for necessary expenses properly chargeable thereto.

1919: Various items, aggregating $278.12.
1920: Various items, aggregating $2,364.56.
1921: Various items, aggregating $40,190.00.
Total, $42,832.68.

SCHEDULE C, PART II

A statement of all moneys paid on account of the annuities given and bequeathed in and by said will, and whether paid from principal or income of said estate, and the amounts withheld therefrom to meet any income tax thereon.

Name, address, and period	Principal	Income	Tax, withheld principal	Tax, withheld income
Edith Sybel Whitehouse, Newport, R. I.:				
1920				
Apr. 9. Payment to May 14, 1919	$17,000.00	$5,000.00		
May 21. " " " 14, 1920	5,000.00			
Nov. 17. " " Nov. 14, 1920		2,500.00		
1921				
May 14. " " May 14, 1921		2,500.00		
Nov. 14. " " Nov. 14, 1921		2,500.00		

SCHEDULE C, PART III

A statement of the assets of said estate which have been permanently set aside to The James Gordon Bennett Memorial Home for New York Journalists Corporation, the residuary devisee and legatee under said will, but subject to taxes, annuities, and other charges.

On December 30, 1920, the said executors permanently set
54 aside as part of the residuary estate and as the property of The James Gordon Bennett Memorial Home for New York Journalists Corporation, but under the control of the executors, as security for the payment of taxes, annuities, or any other charges

against the estate under the will and the income therefrom to be used for the payment of the annuities, as far as may be necessary, the following securities, viz:

Summary of assets to set aside as aforesaid

Promissory notes of Frank A. Munsey Co	$2,000,000.00
Bonds and mortgages on Fort Washington property, balance of principal due thereon	1,097,990.00
Bond and mortgage of Norman Countryman, balance of principal due thereon	450.00
$34,900 U. S. Victory loan bonds, amount invested therein	34,741.24
Balance of cash uninvested	78.76
Total	3,133,260.00

A statement of all real property mentioned in Schedule A, Part I, remaining unsold and of all personal property mentioned in Schedule A, Part III, remaining unsold or undisposed of, and of all other moneys, securities, and other personal property in the hands of the said executors on the 30th day of November, 1921, including the said assets so permanently set aside for The James Gordon Bennett Memorial Home for New York Journalists Corporation as aforesaid, with the appraised value of, the amount secured by, or invested
55 in said personal property, and which said real and personal property constituted the balance of the estate of the said testator held by the said executors under said will on said date.

Recapitulation

REAL PROPERTY

Borough of Bronx, section 12, block 5376, lot 98.	
Yonkers lots unsold:	
Lots 21 and 22, block 15, map A.	
Lots 1–7, block 17, map B.	
Lots 1–11, block 1, map B.	
Yonkers lots sold but sales not closed:	
Balance of purchase price	$56,828.25

PERSONAL PROPERTY

Personal and household effects, appraised value	8,672.95

SECURITIES

Appraised values thereof, amounts invested therein, or due thereon	3,855,975.66

MONEYS

Balance of principal	156,352.36
Balance of income	57,726.76
Total	4,135,461.98
Retained by Title Guarantee & Trust Co.	3,000.00

There was offered in evidence on behalf of taxpayers a letter or notice sent by the Commissioner of Internal Revenue to the estate

of James Gordon Bennett relating to the liability of the estate for the Federal estate tax; objected to as irrelevant, incompetent, and immaterial to any issue in these appeals. Objection sustained, and exception taken and noted.

56 The above and foregoing statement of evidence is approved, settled, and allowed this 21st day of September, A. D., 1928.

JOHN B. MILLIKEN,
Member, United States Board of Tax Appeals.

Approved:

SPOTSWOOD D. BOWERS.

Now, October 4, 1928, the foregoing statement of evidence certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Præcipe for transcript of record

Filed June 26, 1928.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit copies, duly certified as correct, of the following documents and records in the above-entitled cause in connection with the petition for review by the said United States Circuit Court of Appeals for the First Circuit heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the board.
2. Pleadings before the board.
   (a) Petition, including annexed copy of deficiency letter.
   (b) Answer.
3. Findings of fact, opinion, and decision of the board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of copy of petition for review.
5. The statement of evidence as settled and allowed.

57–58 6. Orders enlarging the time for the preparation of the evidence and for the transmission and delivery of the record.

7. This præcipe.

C. M. CHAREST,
Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing præcipe certified from the record as a true copy.

[SEAL.]

B. M. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Memorandum

Orders of enlargement of time for docketing case to and including October 8, 1928, are here omitted.

A. I. CHARRON, *Clerk.*

59 In United States Circuit Court of Appeals for the First Circuit

No. 2294. October term, 1929

COMMISSIONER OF INTERNAL REVENUE, PETITIONER FOR REVIEW

v.

SYBIL WHITEHOUSE

Appeal from Board of Tax Appeals

Before BINGHAM, ANDERSON, and WILSON, JJ.

Opinion

Filed February 17, 1930

ANDERSON, J.: This is an appeal by the Commissioner of Internal Revenue from an adverse decision of the Board of Tax Appeals in 7 B. T. A. 600. It involves the question whether an annuity of $5,000 bequeathed to Sybil Whitehouse by James Gordon Bennett is taxable to her as income. Bennett, a citizen of New York, died on May 14, 1918, leaving a will, duly probated, by which the appellee and several others were left annuities aggregating over $100,000; the residue of the estate was left to a public charity, The James Gordon Bennett Memorial Home for New York Journalists, to be incorporated "as soon as practicable"; pending such incorporation the income of the estate was left to three friends (also made executors) absolutely; the home was organized in May, 1919, about a year after Bennett's death. By the executors' account on December 30, 1920, they show that they had permanently set aside to the home a residue of
60 personal property of $3,133,260, subject to taxes, annuities, and other charges. This annuity and most of the others were paid from the corpus of the estate, until November 14, 1920; thereafter, this and most of the others from income.

The applicable provisions of the revenue act of 1921 (c. 136, 42 Stat. 227) are as follows:

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property,

whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (c) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer; * * * but

"(b) Does not include the following items, which shall be exempt from taxation under this title: * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income * * *.

"SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct. * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except
61 that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

The present question is whether this annuity was a gift or bequest under s. 213 (b) (3), supra, or was distributive income taxable under s. 219 (4), supra.

We think the Board of Tax Appeals was right in holding it a bequest within the fair meaning of s. 213 (b) (3), and therefore not taxable as part of the annuitant's income.

In general we observe that the opinion of the Board of Tax Appeals is sound and adequate, both in its reasoning and in its citation and treatment of the pertinent authorities; it leaves little to be added by this court.

The law of New York obviously controls in construing the will. (De Vaughn v. Hutchinson, 165 U. S. 566, 570.)

The corpus of the estate of the testator was charged with the payment of the annuities. No specific fund was set aside in trust for their payment. (Pierrepont v. Edwards, 25 N. Y. 128; Clark v. Clark, 147 N. Y. 639; Peck v. Kinney, 143 Fed. 76, and authorities cited.) In Matter of Toms (84 Misc. Rep. (N. Y.) 312, 147 N. Y. Sup. 550) the court said:

62 "Annuties like the one created by this will are simply bequests of certain specific sums payable periodically. They do not possess any of the elements of a trust. (Redf., Surr. § 737a; Matter of Collins, 144 N. Y. 522, 39 N. E. 629; Reid v. Brown, 54 Misc. Rep. 483, 106 N. Y. Sup. 27.)

"They are therefore not subject to the provisions of law which forbid the alienation by a beneficiary of the benefits of a trust fund."

See also Matter of Gurnee (84 Misc. Rep. (N. Y.) 324, 147 N. Y. Sup. 396, and Matter of Kohler, 193 App. Div. (N. Y.) 8, 20, 183 N. Y. Sup. 550); Remsen on The Preparation and Contest of Wills (s. 2), where it is said:

"An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.

"Annual taxes on principal are deducted from a use or income but not from annuities. An annuity is presumed to be for life, unless otherwise expressed. It may be given to two or more persons with right of survivorship, as to a husband and wife 'during their natural lives.'"

In its legal nature an annuity, such as is here involved, is a legacy payable in installments, generally during the life of the legatee. (Compare 3 C. J. pp. 201, 202.)

Of course in administering an estate, taxes, debts, legacies, including annuities, are paid primarily out of income, if available, then out of personal property, and lastly, from realty. In administering this testator's estate the first year's income went to his executors; consequently the annuities were properly paid from the corpus of the estate. Then the home was organized, but presumably had few occupants, so that income remained available for at least a large part of the annuities. But if the residue set aside for the

home, subject to the annuities, etc., had proved non-income-producing, or if the executors had applied all income received to the use of the home, the corpus of the residue would have had to
63 be charged with the payment of the annuities. It follows that the actual payment of the appellee's annuity from income was merely an incident, probably temporary, of the administration of the estate; it might almost be called an accident.

If material, we assume that all of the annuities were subject to the estate tax; so that to sustain the commissioner's construction would involve double taxation, a result "to be avoided unless required by express words" of a tax act. (United States v. Supple-Biddle Co., 265 U. S. 189, 194.)

We agree with the Board of Tax Appeals that the cases of Irwin v. Gavit (268 U. S. 161) and Heiner v. Beatty (17 Fed. (2d) 743, affirmed 276 U. S. 598) are not in point. The taxpayer in the Gavit case was limited to receipt of part of the income from a trust fund, with remainder over. This was held by a majority of the Supreme Court not a gift or bequest within the meaning of the tax act (s. 213 (b) (3)). But in the instant case we are dealing with a bequest of a sum certain, payable during the life of the legatee, from the corpus of the estate, unless of course income be available for such payment, as pending development of needs of the home there was. How long such income will be thus available is entirely uncertain. It would seem anomalous to tax such annuities as income of the recipient one year and not permanently. Apparently the Government made no attempt to tax them for the two years when actually paid from the corpus of the estate.

In the Beatty case, the testator expressly provided that there be "set apart * * * in trust * * * in separate funds, one for each annuitant, sufficient sums to produce by the clear net interest and income thereof respectively, the several annuities, * * * and to pay the several annuities from the * * * income * * * or to purchase such annuities in life insurance companies." The Supreme Court affirmed, on the authority of Irwin v. Gavit, the decision of the Circuit Court of Appeals for the Government, reversing the holding for the plaintiff in 10 Fed. (2d) 390.

The decision of the Board of Tax Appeals is affirmed.

64 In United States Circuit Court of Appeals

Minute entries

On November 22, 1929, a motion for revival and for substitution of Robert H. Lucas, Commissioner of Internal Revenue, as party respondent, assented to, was filed by the petitioner for review and approved by the court.

On January 14, 1930, this case came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable

George W. Anderson, and Honorable Scott Wilson, circuit judges, sitting.

In United States Circuit Court of Appeals

Final decree

February 17, 1930

This cause came on to be heard January 14, 1930, upon the record upon petition for review of the United States Board of Tax Appeals and was argued by counsel.

Upon consideration whereof it is now, to wit, February 17, 1930, here ordered, adjudged, and decreed as follows: The decision of the Board of Tax Appeals is affirmed.

By the court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on April 18, 1930, mandate issued.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

[Indorsement on cover:] Filed No. 35,042. U. S. Circuit Court of Appeals, First Circuit. Term No. 129. Robert H. Lucas, Commissioner of Internal Revenue, petitioner, vs. Sybil Whitehouse. Petition for writ of certiorari and exhibit thereto. Filed May 17, 1930. File No. 35042.

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No. 34 129

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SYBIL WHITEHOUSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No.——

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

SYBIL WHITEHOUSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on February 17, 1930, affirming the decision of the United States Board of Tax Appeals.

QUESTION PRESENTED

Whether an annuity actually paid out of the income of an estate under a will which does not direct

it to be paid out of income is taxable as income to the recipient under the provisions of the Revenue Act of 1921.

STATEMENT

This case reached the Circuit Court of Appeals on the petition of the Commissioner of Internal Revenue for a review of the decision of the Board of Tax Appeals determining that there was no deficiency in respondent's income tax for the year 1921. (R. 33.)

James Gordon Bennett died May 24, 1918, leaving a last will and testament, the material provisions of which are set forth in the record. (R. 15–20, 43–48.) Under the will, the testator provided for a number of annuities to be paid to various individuals, including the respondent. The terms of the will relating to the annuity in question are as follows (R. 16):

> Tenth: I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of Five thousand dollars.

The will further provided (R. 44):

> All the above annuities mentioned in paragraphs ten to twenty-five of this my Will shall be paid in equal semi-annual payments reckoning from the time of my death.

In paragraph twenty-nine of the will the testator stated that it had been his intention and purpose to establish a substantial and permanent memorial to his father, the founder of the New York Herald.

To carry out this intention the will provided that the testator's executors should incorporate a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists." The general objects and purpose of the corporation were to provide and maintain a suitable and comfortable home or to provide pecuniary aid for certain persons employed by newspapers in the Borough of Manhattan, City of New York. (R. 45.) The will devised and bequeathed all of the residue of the estate of the testator to this corporation. (R. 48.)

The will also provided (R. 48):

> I authorize and empower said Executors or Executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. * * *

The annuity provided for the respondent was paid to her in 1921 by the executors of the will of the testator, out of the income of the estate. (R. 20.) No provision of the will directed this, and in previous years the annuity had been paid from principal. (R. 20–21.)

In November, 1921, the executors filed in the Surrogate's Court for the County of New York, an intermediate account of settlement which was thereafter approved by the court. (R. 20.) This account

shows that on December 30, 1920, the executors permanently set aside to the James Gordon Bennett Memorial Home for New York Journalists Corporation, as part of the residuary estate but subject to taxes, annuities, and other charges, securities to the value of $3,133,260.00. (R. 21.)

SPECIFICATION OF ERRORS TO BE RELIED ON

The Circuit Court of Appeals erred in holding that the annuity paid during 1921 was exempt as a legacy under Section 213 (b) (3) of the Revenue Act of 1921, and in refusing to hold that the payment was taxable income within the meaning of Sections 213 (a), 219 (a), and 219 (d) of the Revenue Act of 1921.

REASONS FOR GRANTING THE WRIT

I. The case involves an important question of statutory construction. Section 219 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 246 (*infra*, pp. 8-9), appears to require the taxation of all income of estates (particularly when read in connection with Section 213 (a) of the same Act (p. 7, *infra*) which provides that gross income shall include income from any source whatever), while Section 213 (b) of the same Act (p. 8, *infra*) exempts from taxation the value of property acquired by bequest. The latter section does not expressly limit the exemption to bequests of corpus as distinguished from bequests of income, although it requires that the income from bequests be included in gross income.

II. The decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in *Irwin* v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598. In *Irwin* v. *Gavit, supra*, this Court held that the provisions of the Revenue Act of 1913 exempting bequests assumed the bequest of a corpus, and were not intended to exempt the bequest of income from a trust fund. *Beatty* v. *Heiner, supra*, was decided on the authority of *Irwin* v. *Gavit, supra*. In the present case, the annuity was actually paid out of the income of the estate, but the effect of the decision of the Circuit Court of Appeals is that the annuity was nevertheless exempt as a bequest. There appears to be no reason to construe the Revenue Act of 1921 differently from the Revenue Act of 1913 in this respect.

III. The question is one of present importance. The relevant provisions of the Revenue Act of 1921 are repeated in substance in the Revenue Acts of 1924, 1926 and 1928. (See Sections 213 (a), 213 (b) (3), 219 (a) and 219 (b) (3) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 267, 268, 275, 276, U. S. C., Title 26, Secs. 954 and 960; Sections 213 (a), 213 (b) (3), 219 (a) and 219 (b) (3) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 23, 24, 32, 33, U. S. C. App., Title 26, Secs. 954 and 960; Sections 22 (a), 22 (b) (3), 161 (a) and 162 (c) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 797, 798, 838, 839, U. S. C. Supp. III, Title 26, Secs. 2022, 2161 and 2162.) The same question is now pending

in other cases, and will probably arise repeatedly in the future.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 14) are reported in 7 B. T. A. 600. The opinion of the United States Circuit Court of Appeals (R. 59) is reported in 38 F. (2d.) 162.

JURISDICTION

The order of the Circuit Court of Appeals affirming the decision of the Board of Tax Appeals was entered on February 17, 1930. (R. 62.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The relevant provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 238, 246, are as follows:

> SEC. 213. That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the

ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * but

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or

trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. * * *

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. * * *

ARGUMENT

I

ANNUITIES PAID OUT OF THE INCOME OF ESTATES ARE TAXABLE AS INCOME AND NOT EXEMPT AS BEQUESTS

During 1921, the taxable year in question, the executors of the will of James Gordon Bennett paid to the respondent (annuitant) the annual amount

provided by the will, the payment being made out of the income of the estate. (R. 20.) The will did not specify that it should be paid out of income, and in previous years it had been paid out of principal. (R. 20-21.) In determining whether such payment is taxable income, it is important at the outset to examine the statute in the light of all relevant provisions. Section 213 (a) of the Revenue Act of 1921, *supra*, contains the broad provision that gross income includes income derived from any source whatever. Section 219 (a), *supra*, applies the tax to all income of estates, including (paragraphs 1 and 4 of Section 219 (a), *supra*) income received during the period of administration, and income distributed to beneficiaries periodically whether or not paid at regular intervals. Section 219 (c), *supra*, requires the fiduciary to pay the tax on all income except that distributed periodically to the beneficiary, and the beneficiary pays the tax on the income distributed periodically, as provided in Section 219 (d), *supra*.

The foregoing provisions of the statute are comprehensive, harmonious, and sufficient in themselves to establish that all income of estates is subject to the income tax, either in the hands of the fiduciary or the beneficiary, depending upon whether it is periodically distributed. The payment of an annuity is, of course, a periodic distribution, and, if taxable, is taxable to the beneficiary.

Respondent urges that Section 213 (b), *supra*, which exempts bequests, has the effect of exempt-

ing the annuity payment even though such payment is made from income. Petitioner urges, on the other hand, that this exemption, when read in the light of the other sections of the statute, can apply only to bequests of capital as distinguished from bequests of income.

Section 219 (d) provides that the fiduciary (executor) is not to pay the tax, and if taxpayer's theory is correct the income is exempt as a bequest. The taxpayer's theory consequently would defeat the express intention to tax such income as expressed in Sections 219 (a) (4) and 219 (d).

It is elementary that the statute is to be construed as a whole so as to give effect to its manifest purpose and intent. Moreover, different provisions of a statute are to be reconciled, as far as practicable, so as to render them consistent and harmonious, giving a reasonable and practical effect to each. *Cox* v. *Timm,* 182 Ind. 7, 13; *Bowman* v. *Hamlett,* 159 Ky. 184, 191; *State* v. *Coupe,* 91 Neb. 463, 467. We therefore contend that the statute was designed to tax as income to the beneficiary all of the income of an estate actually distributed to the beneficiary as such, exempting only bequests of capital. Congress intended to use its power to the full extent. *Eisner* v. *Macomber,* 252 U. S. 189, 203.

The principles underlying this construction of the statute find support in *Irwin* v. *Gavit,* 268 U. S. 161, and *Heiner* v. *Beatty,* 17 F. (2d) 743 (C. C. A. 3d), affirmed, *Beatty* v. *Heiner,* 276 U. S. 598.

In *Irwin* v. *Gavit, supra,* the testator provided for the creation of a trust fund and the payment of part of the income therefrom to the taxpayer for life. The taxpayer urged that the payments were exempt as bequests. The argument was urged there by the taxpayer (as it has been in this case) that the payments were not income although paid out of income from the trust estate, because the taxpayer received no interest in the corpus. The reasoning of this Court, although specifically applicable to the Revenue Act of 1913, is equally controlling under the Revenue Act of 1921. The Court said (pp. 167-168):

> But we think that the provision of the act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund. No such conclusion can be drawn from *Eisner* v. *Macomber,* 252 U. S. 189, 206, 207. The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee.
>
> The Courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard those considerations as conclusive, as we have said, but if it were material a gift of the income of a fund or-

> dinarily is treated by equity as creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes. * * * It is said that the tax laws should be construed favorably for the taxpayers. But that is not a reason for creating a doubt or for exaggerating one when it is no greater than we can bring ourselves to feel in this case.

The court below sought to distinguish *Irwin* v. *Gavit, supra,* and *Beatty* v. *Heiner, supra,* upon the theory that in those cases the will expressly required that the payments be made out of income, and a specific fund was set aside for the production of the income. In the present case, the residuary estate was held for the payment of annuities and for other named purposes, and the annuity was in fact paid out of the income of the estate. (R. 20.) Annuities are primarily paid out of income. *Cummings* v. *Cummings,* 146 Mass. 501, 508. The fact that in a prior or subsequent year there may have been no available income, and that the annuity may be paid out of corpus in such years, would not alter the principle that the payments are taxable as income when in fact made from income.

II

NO QUESTION OF DOUBLE TAXATION IS INVOLVED

Respondent urged below that double taxation would result from petitioner's construction because of the estate tax levied upon the transfer of the net estate.

In view of the express provision of the statute that beneficiaries shall pay an income tax upon the income of estates distributed periodically to such beneficiaries, the question of whether double taxation may result is immaterial. In this connection, this Court, in *Hellmich* v. *Hellman*, 276 U. S. 233, said (p. 238):

> When, as here, Congress has clearly expressed its intention, the statute must be sustained even though double taxation results. See *Patton* v. *Brady*, 184 U. S. 608; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, 330.

See also the analysis of the question by the Board of Tax Appeals in the case of *Bull* v. *Commissioner*, 7 B. T. A. 993, 1000–1001.

While the question of double taxation is, therefore, immaterial, it is clear that no double taxation will result from the taxation of the annuity as income in this case. The estate tax is levied upon the transfer of the net estate of the decedent and is based upon the value of the net estate. Revenue Act of 1921, Sec. 401, 42 Stat. 277. Such tax upon transfers measured by the value of the net estate,

has no relation to the taxation of the annuities. The income from the estate, when distributed to the beneficiaries, does not reduce the corpus, and the taxation of the annuities does not fall upon the corpus. Likewise, the tax upon the transfer of the net estate does not affect the specific annuity payable to the respondent.

Moreover, the estate tax is not an income tax, but is an excise tax levied upon the transfer of the net estate. *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349; *Knowlton* v. *Moore*, 178 U. S. 41; Revenue Act of 1921, Sec. 401. Such a tax has a purpose different from that of the income tax, and the levying of a tax upon the transfer of a net estate is distinct from, and in no sense inconsistent with, a tax upon the income arising from the estate.

III

THE ANNUITY IS TAXABLE INCOME TO THE ANNUITANT IRRESPECTIVE OF WHETHER SHE HAD PREVIOUSLY RECEIVED FROM THE ANNUAL PAYMENTS AN AMOUNT EQUAL TO THE VALUE OF THE BEQUEST OF THE ANNUITY AT THE TESTATOR'S DECEASE

Respondent also urged below that no taxable income arises from annuity payments until she has received amounts equal to the value of the annuity determined as of the date of testator's death. In support of the argument, respondent cited several decisions, including *United States* v. *Bolster*, 26 F. (2d) 760 (C. C. A. 1st). But in each of the cases cited the taxpayers accepted the annuities in lieu of

dower or similar statutory rights in the estate of the decedent. Under those facts, it was held that the waiver of the dower right was a valuable consideration, and the annuities represented "purchase money" or a return of capital. In *United States* v. *Bolster, supra,* the court recognized the distinction between that case and *Heiner* v. *Beatty,* 17 F. (2d) 743 (affirmed, *Beatty* v. *Heiner,* 276 U. S. 598), here relied upon by the petitioner, and said (p. 763):

> In *Heiner* v. *Beatty, supra,* it was contended that income received by the taxpayer under the will of the decedent was exempt from taxation because that income constituted a "bequest." In the instant case the ground of the exemption is, not that the income received is a bequest, but that such income is exempt, because it represents "purchase money" or a return of capital. In that case the record disclosed facts similar to those in *Irwin* v. *Gavit, supra.*

The facts in the present case show that the taxpayer received, as an annuity, income from the decedents' estate and not a return of an invested capital sum. There was no investment of any capital sum by the taxpayer to the return of which she might be entitled. The capitalized value of the annuity which forms the basis for the estate or transfer tax in the present case is analogous to that part of the corpus of the estate in *Heiner* v. *Beatty, supra,* from the income of which the annuity was paid. In fact, in *Heiner* v. *Beatty,* the executors

were given the authority, in the alternative, to purchase an annuity for the beneficiary. In neither instance was there cost to the annuitant, and it is clear from the opinion in *Heiner* v. *Beatty* that the annuity payment would likewise have been taxed as income to the beneficiary if the annuity had been purchased by the executors under their alternative power. The important consideration in that (as well as in the present case) is that the annuitant contributed no purchase price, incurred no cost, and invested no capital sum to the return of which she was entitled before taxable income arose.

CONCLUSION

In view of the importance of the question here presented, as well as the probable conflict of the decision of the Circuit Court of Appeals with decisions of this Court, it is urged that this petition be granted.

Respectfully submitted.

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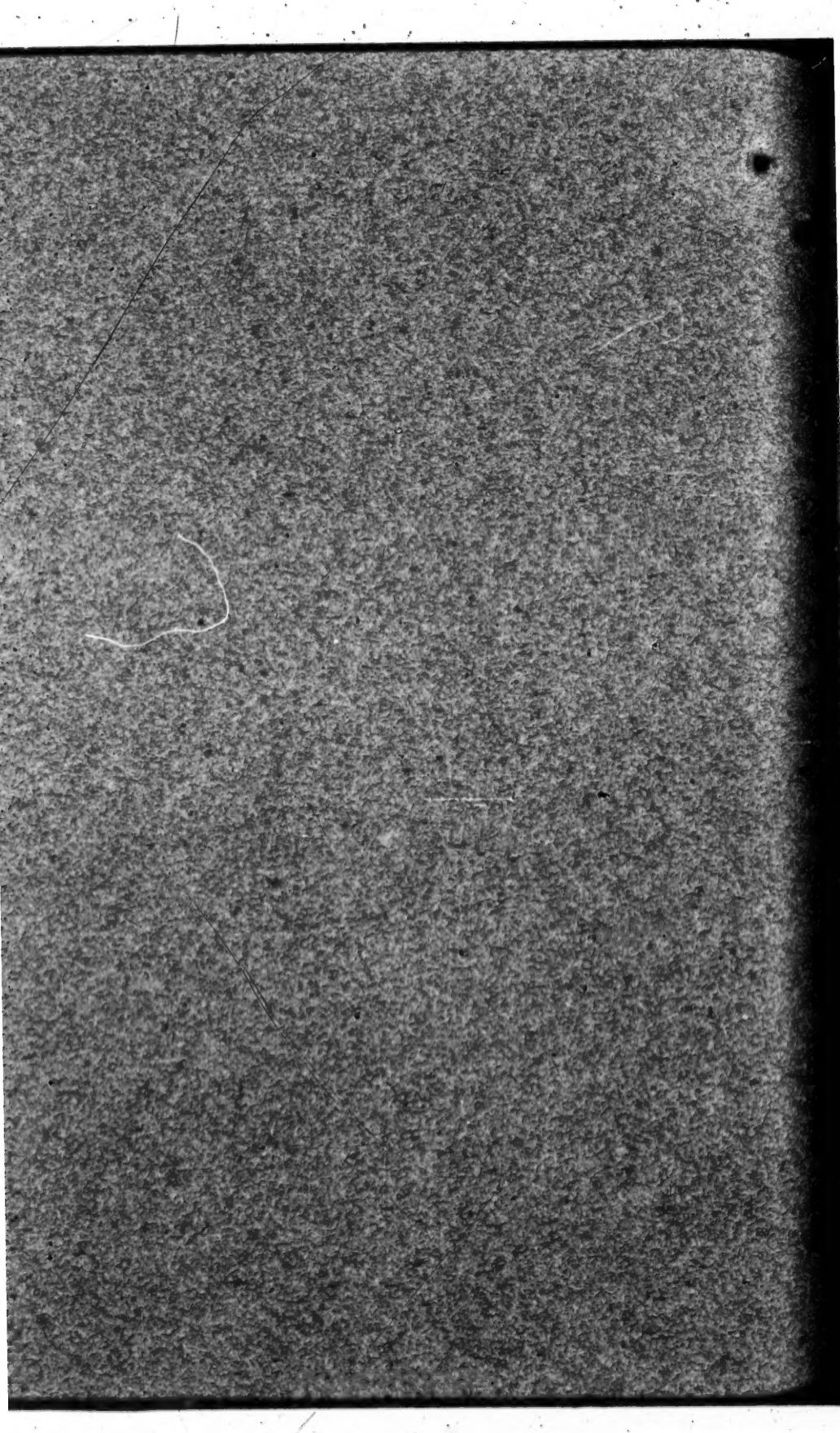

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No. 129

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SYBIL WHITEHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14) is reported in 7 B. T. A. 600. The opinion of the Circuit Court of Appeals for the First Circuit (R. 38) is reported in 38 F. (2d) 162.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 17, 1930. (R. 42.) The petition for a writ of certiorari was filed May 17, 1930. Certiorari was granted on October 13, 1930. (R. 42.) The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an annuity paid in instalments out of the income of an estate under a will which does not direct how the annuity shall be paid is taxable as income to the recipient under the provisions of Section 213 (a) and/or Section 219 of the Revenue Act of 1921, or to state it another way, whether such payments are exempt from tax as a bequest under Section 213 (b) (3) of that Act.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 29–33.

STATEMENT

James Gordon Bennett died on May 24, 1918, leaving a last will and testament, the material provisions of which are set forth in the record. (R. 10–13, 28–32.) Under the will the testator provided for a number of annuities to be paid to various individuals, including the respondent. The terms of the will relating to the annuity in question, are as follows (R. 10):

> Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars.

The will further provided (R. 29):

> All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semiannual payments, reckoning from the time of my death.

In paragraph twenty-nine of the will the testator stated that it had long been his intention and purpose to establish a substantial and permanent memorial to his father, the founder of the New York Herald. (R. 11, 30.) To carry out this intention the will provided that the testator's executors should incorporate a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists." (R. 11, 30.) The general objects and purpose of the corporation were to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who had been employed by newspapers in the Borough of Manhattan, City of New York, and who should become incapacitated or in need of assistance. (R. 11, 30.) The will devised and bequeathed all of the residue of the estate of the testator to this corporation. All the income of the residuary estate prior to the formation of the corporation was given and bequeathed to Eugene Higgins, Rodman Wanamaker, and James Stillman. (R. 31.) These three men were also named as executors. (R. 32.)

The will further authorized the sale of any property for the payment of debts and of annuities and further provided as follows (R. 32):

> I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me.

The annuity provided for the respondent was paid to her in 1921 by the executors of the will of the testator out of the *income* of the estate. (R. 13.)

In November, 1921, the executors filed in the Surrogate's Court for the County of New York an intermediate account of settlement, which was thereafter approved by the court. The account showed that all of the annuities paid to the taxpayer and certain other annuitants were, prior to November 14, 1920, paid out of the corpus of the estate and those paid subsequently thereto were paid out of income. (R. 13.)

The account of settlement also shows that on December 30, 1920, the executors permanently set aside to the James Gordon Bennett Memorial Home for New York Journalists Corporation, but subject to taxes, annuities, and other charges, securities to the value of $3,133,260.00. (R. 14.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the annuity paid during 1921 was exempt as a bequest under Section 213 (b) (3) of the Revenue Act of 1921, and in refusing to hold that the payment was taxable income within the meaning of Sections 213 (a), 219 (a), and 219 (d) of the Revenue Act of 1921.

SUMMARY OF ARGUMENT

I. In *Irwin* v. *Gavit*, 268 U. S. 161, this Court held that a gift of the income from a trust fund for

life, the beneficiary having no interest in the corpus, was taxable to the beneficiary under the Revenue Act of 1913 and was not exempt from tax as a bequest under that Act. Similar principles were applied in *Heiner* v. *Beatty*, 17 F. (2d) 743 (C. C. A. 3d), affirmed *per curiam*, 276 U. S. 598. The exemption provision in Section 213 (b) (3) of the Revenue Act of 1921, here involved, is in substance and effect the same as that involved in those cases.

In view of the fact that annuities are paid primarily from income, that the decedent left a residuary estate which would produce sufficient income for the payment of the annuities and that the payments taxed were in fact paid from income of the estate, it can not be said that the bequest was one of corpus. Hence the annuity is taxable under the decision of *Irwin* v. *Gavit, supra.*

The intention of Congress not to permit any of the income of an estate or trust to escape taxation is even clearer under the Revenue Act of 1921 than under the Revenue Act of 1913 construed in the *Gavit case.* Section 219 of the Act of 1921 specifically requires the trustee or executor to pay a tax on income received by him for the trust or the estate in certain cases and requires the beneficiary to pay the tax in other cases and this section when read in connection with Section 213 was intended to reach all income. Section 213 (b) (3) of the Revenue Act of 1921 must, therefore, be construed in conjunction with Section 219, with which it is *in pari materia.* The latter section makes the taxes

imposed by Sections 210 and 211 applicable to the income of estates of deceased persons during the period of administration and also to the income of estates and trusts which is to be distributed periodically, whether or not at regular intervals. It constitutes the estate or trust a separate taxable entity but requires the beneficiary to pay the tax on the portion of the income actually distributable to him. So far as the beneficiary is concerned, the test of taxability is whether there is distributable to him the net income of an estate or trust. *Riker* v. *Commissioner*, 42 F. (2d) 150 (C. C. A. 2d).

The Board of Tax Appeals and the Circuit Court of Appeals, in refusing to apply the principles of *Irwin* v. *Gavit*, and *Heiner* v. *Beatty* to the instant case, have distinguished between the case of a life beneficiary under a trust fund established under a will and a beneficiary receiving an annuity for life from a residuary estate. That technical distinctions between "bequests of income" and annuities are made is conceded, but these distinctions are of form, not of substance. In substance there is no distinction between income paid in one form or in another.

If the existence of a particular fund does make a difference, it is pointed out that the annuity which has been taxed here was paid from the particular fund established December 30, 1920, when the executors permanently set aside to the residuary devisee and legatee certain assets in the amount of $3,133,260, *subject to taxes, annuities, and other*

charges. The will impliedly gave the executors authority to make any provision for the payment of annuities which they deemed advisable.

But the question of taxability of income distributed to a beneficiary of an estate does not depend upon the existence of a fund, for in its absence the entire residuary estate is a fund in which the beneficiary has an interest. Moreover, payments of income may be made while the estate is in process of administration before the authorized fund is set up and in such case are clearly taxable. See *Matter of White* v. *Gilchrist*, 214 App. Div. 153, involving that question under the New York tax statute.

Section 213 (b) (3) should be construed as relating only to bequests of capital which have already been reached by Federal estate tax and as having no application to annuities paid from income. Otherwise, income from an estate which Congress intended to tax will escape taxation wholly and the provisions of Section 219 will be nullified.

II. The annuity constitutes taxable income to the respondent irrespective of whether she had received in annual payments an amount equal to the value of the bequest of the annuity on the date of the testator's death. The respondent made no investment of capital and relinquished no valuable rights in consideration of the receipt of the annuity. The cases relied upon by the respondent where annuities were purchased are distinguishable.

III. In view of the express provision of Section 219 that beneficiaries shall pay an income tax upon the income of estates distributed to them, the question as to whether double taxation will result is immaterial. *Hellmich* v. *Hellman*, 276 U. S. 233, 238. Moreover, no double taxation will result from the taxation to the beneficiary of such part of the income of the estate as is distributable to her. This tax will not fall upon the corpus of the estate, nor will the estate tax on the transfer of the net estate affect the annuity payable to the respondent.

ARGUMENT

I

ANNUITIES PAID OUT OF THE INCOME OF ESTATES CONSTITUTE TAXABLE INCOME TO THE RECIPIENTS UNDER THE REVENUE ACT OF 1921 AND ARE NOT EXEMPT AS BEQUESTS UNDER THAT ACT

Section 213 of the Revenue Act of 1921 (*infra*, pp. 29–30) provides:

> That for the purposes of this title * * * the term "gross income"—
>
> * * * * * *
>
> (b) Does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * * *
>
> (3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income).

We submit that the amount received by the respondent in the instant case was not exempt from taxation under this section, and that the present case is controlled by the decision of this Court in *Irwin* v. *Gavit*, 268 U. S. 161. There, as here, the income from an estate was paid to a beneficiary who acquired the right to receive it under the testator's will. The statute there involved was the Revenue Act of 1913 which, like the Revenue Act of 1921, laid a general tax upon income and contained an exemption of bequests. Section II, paragraph B, Act of October 3, 1913 (*infra*, p. 29). Both statutes make it clear that the income from bequests is not within the exemption.

The principal difference between the instant case and *Irwin* v. *Gavit* is that in the latter case the beneficiary had the right to receive a portion of the income only, while in this case the beneficiary has a right to receive certain annual payments with no restrictions as to whether they shall be paid from income or corpus. As a matter of fact, however, the residuary estate in this case was of sufficient size to produce the annuities and the annuity payments made to the beneficiary in the taxable year here involved were made from income earned by the residuary estate.

We think that this difference in the terms of the instrument giving the right is not material, that the principle of the *Gavit case* is equally applicable here, and that the income in this case, like that in the *Gavit case*, is income produced by the right

acquired under the will and therefore not exempt from taxation. The exemption in the Revenue Act of 1921, like that in the Revenue Act of 1913, does not extend to income, properly so called when distributed to a beneficiary. The same contention made here, that the income is exempt as a bequest, was made in the *Gavit case*. In rejecting that contention, this Court said (pp. 167–168):

> It seems to us hardly less clear that even if there were a specific provision that A should have no interest in the corpus, the payments would be income none the less, within the meaning of the statute and the Constitution, and by popular speech. In the first case it is true that the bequest might be said to be of the corpus for life, in the second it might be said to be of the income. *But we think that the provision of the act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund.* No such conclusion can be drawn from *Eisner* v. *Macomber*, 252 U. S. 189, 206, 207. The money was income in the hands of the trustees and we know of nothing in the law that prevented it being paid and received as income by the donee.
>
> The Courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard those considerations as conclusive, as we have said, but if it were

material *a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund.* Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes. * * * *But the distinction between the cases put of a gift from the corpus of the estate payable in instalments and the present seems to us not hard to draw, assuming that the gift supposed would not be income.* This is a gift from the income of a very large fund, as income. It seems to us immaterial that the same amounts might receive a different color from their source. (Italics ours.)

The same question arose in the case of *Heiner* v. *Beatty*, 17 F. (2d) 743 (C. C. A. 3d), which was affirmed *per curiam*, 276 U. S. 598, on the authority of *Irwin* v. *Gavit*, *supra*. In the *Beatty case* the testator provided for the payment of certain annuities to John W. Beatty and others, and directed his executor and trustee either (1) to set apart, hold in trust, invest, and keep invested in separate funds, one for each annuitant, sufficient sums to produce the several annuities, and to pay them from the interest and income of the respective funds in semi-annual payments, or (2) to purchase such annuities in life insurance companies. The executor and trustee adopted the first method of providing for the payment of the annuities. The Circuit Court of

Appeals for the Third Circuit held these annuities to be taxable and its decision was affirmed by this Court.

In this case the respondent did not receive a gift from the corpus of the estate payable in instalments. The record shows that in compliance with the provision of the will, the executors on December 30, 1920, permanently set aside to the residuary devisee and legatee, the James Gordon Bennett Memorial Home for New York Journalists Corporation, *"subject to taxes, annuities, and other charges"* (R. 14), certain assets in the amount of $3,133,260. The record shows that the total amount of annuities payable in 1920 was $144,000. (R. 13.) It is assumed that the same amount was payable each year, as the annuities were payable half-yearly from the time of the decedent's death. (R. 10.) The aggregate amount of the annuities paid during approximately three and one-half years from the time of the testator's death until November 30, 1921, was $485,675.31. (R. 34.) The bulk of the residuary estate was made up of promissory notes of a large corporation and bonds and mortgages on real estate. (R. 14.) Such a fund would normally produce sufficient income to satisfy the total annuity payments required and in this case it was found as a fact that in the year 1921 the annuities were paid from income actually produced by this fund. (R. 13.) Since annuities are payable primarily from income (*Delaney* v. *Van Aulen*, 84 N. Y. 16; *Matter of Kohler*, 193 App.

Div. 8, reversed on other grounds, 231 N. Y. 353; *Cummings* v. *Cummings*, 146 Mass. 501), there can be no doubt of the propriety of the payments made in this case.

Not only was the annuity properly paid from income, but it was undoubtedly the intention of the testator that it should be so paid, for the reason that he made a complete disposition of the corpus of his estate by the provision for establishing a charitable corporation.

Respondent is here claiming the benefit of an exemption. It is well settled that exemptions from taxation will be strictly construed. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 136; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232. Since this exemption does not extend to bequests of income, respondent must show that a bequest of corpus was received. Irrespective of how the local law may regard an annuity, the Revenue Acts have their own criteria that look to certain rather severe tests of liability and exemption. *Weiss* v. *Wiener*, 279 U. S. 333. Furthermore, in *Irwin* v. *Gavit*, *supra*, this Court recognized that a bequest within the meaning of the exemption provision of the Revenue Act of 1913 did not include everything which might for other purposes be termed a bequest. Section 213 (b) (3) of the Revenue Act of 1921 is in substance the same as the exemption provision construed in *Irwin* v. *Gavit*, both exempting the value of property acquired by bequest but not the income derived therefrom.

This Court has held in *Towne* v. *Eisner*, 245 U. S. 418, that what in its nature is not income can not be made income merely by calling it such. As a necessary corollary it was indicated in *Irwin* v. *Gavit*, *supra*, that what is income in its nature can not be put beyond the reach of an income tax by handing it over to a beneficiary who has acquired the right to receive it under a will. It was there pointed out that the exemption provision of the statute exempts the gift of a corpus and that the exemption does not extend to the periodical receipt of income produced by the corpus.

It is not necessary to lay down a general rule here that will govern all cases. For present purposes it is sufficient that the money received by respondent was income in its nature, that the corpus was sufficiently large to provide income enough to satisfy the annuities, that there was nothing in the will which prevented the income being used for that purpose and that the testator is presumed to know the law that annuities are primarily paid out of income. Nor is it material that the annuity payments in other years were made from the corpus. (R. 13.) The respondent's tax for those other years is not involved in this case, and what *was* done here, not what might have been done, controls. *United States* v. *Phellis*, 257 U. S. 156, 173; *Miles* v. *Safe Deposit Co.*, 259 U. S. 247, 253; *Remington Rand, Inc.*, v. *Commissioner*, 33 F. (2d) 77, 78 (C. C. A. 2d), certiorari denied, 280 U. S. 591.

The intention of Congress not to permit any of the income of an estate or trust to escape taxation is made more manifest in the Revenue Act of 1921 than it was in the Revenue Act of 1913 construed in the *Gavit case.* No provision was made in the Act of 1913 to require the trustee or executor to pay an income tax on income received by him for the trust or the estate, but the scope of the later Acts was broadened to include such income. *Smietanka* v. *First Trust & Savgs. Bank,* 257 U. S. 602.

The intention of Congress with reference to the taxation or exemption of the annuities involved in this case can not be ascertained by construing Section 213 (b) (3) as an isolated provision, but requires an examination of other provisions. *Price* v. *Illinois,* 238 U. S. 446, 450. Section 219 is *in pari materia* with Section 213 (b) (3) and they must necessarily be construed together.

Section 219 (a) (*infra,* p. 30) provides that the tax imposed by Sections 210 and 211 shall apply to the income of estates or any kind of property held in trust, and subdivisions (1) and (4) specify that this provision relates to income received by estates of deceased persons during the period of administration or settlement of the estate and to income of estates and trusts which is to be distributed periodically, whether or not at regular intervals.

Under the remaining subdivisions of Section 219, income from such estates or trusts which is

distributable to a beneficiary is taxable to the beneficiary both during the period of administration of the estate and after administration is closed. In substance, Section 219 made an estate or trust a separate taxable entity to the end that all income produced by the corpus of an estate should be taxed even though there should be no beneficiary to receive it, but required the beneficiary to pay the tax on the portion of the income actually distributable to him.

So far as the beneficiary is concerned the test of taxability under this section is whether there is distributable to him net income of an estate or trust. That this is the proper test is recognized in the case of *Riker* v. *Commissioner*, 42 F. (2d) 150 (C. C. A. 2d). The question there involved was whether a residuary legatee was taxable upon income received from the estate in process of administration under the Revenue Act of 1921, the statute here involved. The taxpayer there argued that the payment received was an anticipated distribution of corpus and for that reason was not taxable. The court rejected that contention, holding that while the estate might not have been required to distribute any income to the beneficiary before final settlement, the amount received by the beneficiary was income to the estate and did not lose its character as such when distributed to the beneficiary. In that case, as in this, the sum in controversy was properly paid by the estate to the

beneficiary, though the decedent had not expressly provided for the payment of income.

In holding that the annuity paid to the respondent during 1921 was exempt from tax as a bequest, both the Board of Tax Appeals and the Circuit Court of Appeals distinguished the cases of *Irwin* v. *Gavit, supra,* and *Heiner* v. *Beatty, supra,* stating that in those cases the testator provided for the payment to the beneficiary of income from a particular trust fund, no amount being payable from the corpus of the trust, and that in the instant case no particular fund was set aside in trust for the payment of the annuities and they accordingly became a charge upon the corpus of the estate. One member of the Board dissented. (R. 21.)

In thus apparently distinguishing the case of a life beneficiary under a will who receives income in the form of a payment from a trust fund from one receiving similar income in the form of an annuity from a residuary estate, we believe that the Board of Tax Appeals and the Circuit Court of Appeals have relied too strongly upon technical distinctions between so-called "bequests of income" and "annuities" and in so doing have failed to consider whether these distinctions of form rather than substance can properly be given effect in interpreting the pertinent sections of the statute here involved.

That such technical distinctions are made is conceded. It is true that a bequest of income from a particular fund is payable only from income, where-

as an annuity is payable in all events, whether there be sufficient income or not, and in that sense is a charge on the corpus of the estate. *DeLaney* v. *Van Auten*, 84 N. Y. 16; *Matter of Dewey*, 153 N. Y. 63; *Matter of Gurnee*, 84 Misc. Rep. (N. Y.) 324, affirmed without opinion, 165 App. Div. 920, 214 N. Y. 660; *Whitson* v. *Whitson*, 53 N. Y. 479; *Peck* v. *Kinney*, 143 Fed. 76 (C. C. A. 2d). But matters of taxation are to be determined by substance rather than form (*United States* v. *Phellis*, 257 U. S. 156, 168; *Weiss* v. *Stearn*, 265 U. S. 242, 254; *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330; *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S. 110), and in substance there is no difference between payments which in fact are income, whether required to be paid as such or not. If one is not exempt as a bequest, it is difficult to see why the other should be.

If the existence of a fund from the income of which periodic payments are made is necessary to make the decision of *Irwin* v. *Gavit*, *supra*, applicable, it is pointed out that the annuity which has been taxed in the instant case was paid from a particular fund in the year 1921 here involved and in subsequent years. The intermediate account of settlement shows that on December 30, 1920, the executors permanently set aside to the residuary devisee and legatee the James Gordon Bennett Memorial Home for New York Journalists Corporation, *subject to taxes, annuities, and other charges*, certain assets in the amount of $3,133,260.

There was, moreover, implied authority in the will for the establishment of such a fund and the act of the executors was approved by the Surrogate's Court. The will directed the executors to retain and hold any personal property which might belong to the testator at the time of his death and to set it aside for the payment of any annuity and to sell or otherwise dispose of both real and personal property (with the exception of certain stock) for the purpose of paying annuities and other charges. Clearly, the will gave full authority to the executors to make any provision for the payment of the annuities which they deemed it advisable to make, and when they actually established a fund producing sufficient income to pay the annuities and paid them from it, no reason is suggested why Section 219 should not apply. In this connection it is pointed out that the will in the *Beatty case* did not set up a trust fund of a definite amount for the payment of the annuities but merely gave the executor and trustee authority to set apart and hold in trust sufficient sums to produce the annuity or in the alternative to purchase an annuity, but the Circuit Court of Appeals for the Third Circuit held that when the fund was subsequently established the income from it was taxable income to the beneficiary.

Moreover, we do not believe that the question whether a beneficiary should be taxed upon an annuity or any other income distributed periodically by an estate should be made to depend upon whether

a particular fund has been set aside. If no particular fund has been established, the entire estate including the income produced by it, is security for the payments.

That the test of taxability is not whether the income arises from a particular fund is made evident when consideration is given to the fact that even where the will directs the establishment of a fund sufficient to produce the payments of income to the beneficiary, payments may be made during the period of administration of the estate prior to the time when any fund provided for their payment may have been segregated from the assets of the estate. It would scarcely be argued that those payments would not be taxed because the fund had not yet been established.

That view was taken by the Appellate Division of the Supreme Court of New York in *Matter of White* v. *Gilchrist*, 214 App. Div. 153, which involved questions very similar to the questions here involved and arose under the income tax law of the State of New York. Section 359 of that law contains the same provision as to exemption of the value of property acquired by bequest as is involved here, and Section 365 contains provisions for the taxation of income from estates and trusts which are identical in all material respects with the provisions of Section 219 of the Revenue Act of 1921 here involved. The will in that case directed trustees to set aside a fund sufficient to produce certain annual income to be paid a designated beneficiary annually until she

should die or marry again. The executors and trustees failed to set up the fund. The court held the annuities to be taxable. An extract from the opinion in this case is printed as Appendix B, *infra*, pp. 34–35.

The record in the instant case does not show whether the estate was still in process of administration in 1921 and neither the Board nor the Circuit Court of Appeals appears to have considered that possibility. From our point of view the annuity is taxable whether paid from the income of the estate during the period of administration or paid after administration was closed.

The record shows the filing of an intermediate account of settlement but does not show that a judicial settlement was made in accordance with Section 2727 or Section 2729 of the Code of Civil Procedure of New York. The intermediate account which was filed showed that all remaining assets had been permanently set aside for the residuary devisee and legatee, subject to the payment of annuities. The fund thus set aside was held in trust by the executors for the payment of annuities, which they paid out of income. *Matter of Dewey*, 153 N. Y. 63; *Ward* v. *Ward*, 105 N. Y. 68; *Matter of Kohler*, 231 N. Y. 353; *Matter of Zeigler*, 218 N. Y. 544; *Johnson* v. *Lawrence*, 95 N. Y. 154; *Matter of Slocum*, 169 N. Y. 153.

For the foregoing reasons it is believed that the Circuit Court of Appeals erred in construing Section 213 (b) (3) as applicable to annuities paid

from income. So to construe that provision will have the effect of nullifying the provisions of Section 219 and will thus violate the rule that statutes should be so construed, if practicable, that one section will explain and support and not defeat or destroy another section. *Bernier* v. *Bernier*, 147 U. S. 242, 246. We submit that this construction of the statute made by the petitioner will serve to eliminate all possible conflict between Section 213 (b) (3) and Section 219, and to give a sensible and intelligent effect to each.

It is pointed out that the practical effect of the decision below is to enable income of an estate which arises from non-exempt sources to escape taxation altogether. Clearly, the fiduciary can not be taxed upon such income, for under Section 219 (d) of the Act the fiduciary, whether executor or trustee, is not to pay the tax upon income which is distributed to beneficiaries. If such income may not be taxed to the beneficiaries on the theory that it represents a bequest, it is not taxed at all.

II

THE ANNUITY CONSTITUTES TAXABLE INCOME TO THE RESPONDENT IRRESPECTIVE OF WHETHER SHE HAD PREVIOUSLY RECEIVED IN ANNUAL PAYMENTS AN AMOUNT EQUAL TO THE VALUE OF THE BEQUEST OF THE ANNUITY ON THE DATE OF THE TESTATOR'S DEATH.

In her brief in the Circuit Court of Appeals (p. 21) the respondent urged that a gift or bequest of an annuity is indistinguishable from a pur-

chased annuity, which does not produce taxable income until the cost or value has been recovered. The cases of *Allen* v. *Brandeis*, 29 F. (2d) 363 (C. C. A. 8th), *Warner* v. *Walsh*, 27 F. (2d) 952 (D. Conn.), and *United States* v. *Bolster*, 26 F. (2d) 760 (C. C. A. 1st), were cited. See also *Warner* v. *Walsh*, 15 F. (2d) 367 (C. C. A. 2d), and *Logan* v. *Commissioner*, 42 F. (2d) 193 (C. C. A. 2d), now pending before this Court on a writ of certiorari, No. 521, October Term, 1930.

In each of the cases cited by the respondent the taxpayer elected to accept annuities in lieu of dower or similar statutory rights in the estate of the decedent. Under those facts it was held that the waiver of the statutory rights constituted a valuable consideration paid for the annuities and hence that the annuities would not be taxable until there had been a return of capital.

In the *Bolster case, supra,* the Circuit Court of Appeals for the First Circuit emphasized the difference between the question involved in that case and the question involved in the case of *Heiner* v. *Beatty*, 17 F. (2d) 73 (C. C. A. 3rd), affirmed in *Beatty* v. *Heiner*, 276 U. S. 598, which is relied upon by the petitioner as being analogous to the present case. The court said (p. 763):

> In *Heiner* v. *Beatty, supra,* it was contended that income received by the taxpayer under the will of the decedent was exempt

from taxation because that income constituted a "bequest." In the instant case the ground of the exemption is, not that the income received is a bequest but that such income is exempt, because it represents "purchase money" or a return of capital. In that case the record disclosed facts similar to those in *Irwin* v. *Gavit, supra.*

The facts in the present case show that the taxpayer received, as an annuity, income from the decedent's estate as the consequence of a gift and not as the result of the investment of a capital sum or the relinquishment of any valuable rights. There was consequently no part of the annuities which represented a return of capital. The case in that respect is analogous to the case of *Heiner* v. *Beatty, supra.* Attention is called to the fact that in the *Beatty case* the executors were given the authority, in the alternative, to purchase an annuity for the beneficiary, and it appears from the opinion in that case, that the annuity payments likewise would have been taxed as income to the beneficiary, even if the annuity had been purchased by the executors under their alternative power. The important consideration in that, as well as in the present case, is that the annuitant contributed no purchase price, incurred no cost, and invested no capital sum to the return of which she was entitled before taxable income arose.

III

NO QUESTION OF DOUBLE TAXATION IS INVOLVED

The respondent urged in the court below that double taxation will result from the petitioner's construction of the Act because of the Federal estate tax levied upon the transfer of the net estate of James Gordon Bennett. The Circuit Court of Appeals (R. 41) assumed, "if material," that all of the annuities were subject to the estate tax so that to sustain this construction would involve double taxation and cited *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 196, holding that double taxation is a result "to be avoided unless required by express words."

But it is precisely because Section 219 of the Revenue Act of 1921 does expressly require that beneficiaries of estates and trusts shall pay an income tax upon the income of estates distributed to them periodically that the question as to whether double taxation may result is immaterial. In *Hellmich* v. *Hellman*, 276 U. S. 233, this Court said (p. 238):

> When, as here, Congress has clearly expressed its intention, the statute must be sustained even though double taxation results.

While the question of double taxation is, therefore, immaterial, we submit that no double taxa-

tion will result from the taxation of the annuity as income in this case. The estate tax is levied upon the transfer of the net estate of the decedent and is based upon the value of the net estate. Revenue Act of 1916, c. 463, sec. 201, 39 Stat. 756. Such a tax upon transfers, measured by the value of the net estate, has no relation to the annuities. The income here involved was not a part of the corpus of the estate on which the estate tax was levied.

In the court below respondent argued that where the testator provides for the payment of annuities as a charge upon his entire estate with the residuum to a charitable organization, the value of the net taxable estate includes the value of the annuities as of the date of death and in that connection referred to Article 15 of Treasury Regulations 63, providing for the valuation of annuities by mortality tables in determining the value of the net estate for Federal estate tax purposes. But the regulations referred to only relate to the valuation of an annuity which was payable to the decedent for a period of years or for the life of another. An annuity created by the will of the testator is not valued for Federal estate tax purposes, and the regulation referred to has no bearing on this case.

CONCLUSION

The judgment below is erroneous and should be reversed.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

STATUTES

Section II, Paragraph (B) of the Act of October 3, 1913, c. 16, 38 Stat. 114, 167, provides in part as follows:

> B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent: * * *.

The Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 246, provides in part:

> SEC. 213. That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever

kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * but

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, device, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also

be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. * * *

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or

order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. * * *

(e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary.

REGULATIONS

Treasury Regulations 62 provide in part as follows:

ART. 73. *Gifts and bequests.*—Money and real or personal property received as gifts, or received under a will or under statutes of

descent and distribution, are exempt from tax, although the income therefrom derived from investment, sale, or otherwise is not. * * *

ART. 343. *Decedent's estate during administration.*—The "period of administration or settlement of the estate" is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. * * *

ART. 345. *Estates and trusts taxed to beneficiaries.*—In the case of (a) a trust the income of which is distributable periodically, (b) an ordinary guardianship of a minor, and (c) an estate of a decedent before final settlement as to any income properly paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include in his return his distributive share of the net income, even though not yet paid him, but if his taxable year is different from that of the estate or trust, then he need only include in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within his taxable year. The regulations governing partnerships are generally applicable to such an estate or trust.

APPENDIX B

In *Matter of White* v. *Gilchrist*, 214 App. Div. 153, 155–156, the court said:

> We think that, under the holding of the United States Supreme Court, the claim of the petitioner herein can not be sustained, namely, that as to her the annual payments constituted a "legacy" not subject to income tax under that provision of the law (Tax Law § 359, subd. 2, ¶c, as added by Laws of 1919, chap. 627) which excludes from gross income "the value of property acquired by * * * bequest." The executors were appointed trustees by the will and th[illegible] were likewise made the residuary legatees and devisees. The executors have never accounted although ordered to do so in 1916 and it appears that the direction of the will that a fund should be set apart sufficient to produce an annual income of $10,000 has never been carried out. The record shows, however, that for the three tax years involved here the income of the estate in their hands has been more than adequate to pay the $10,000 annually. The sum involved is thus income to the estate and the executors have each year made a fiduciary return to the Tax Commission to the effect that the payment to the petitioner has been made out of income of the estate. The mere fact that the executors and trustees have not obeyed the will of the testator by setting apart the trust fund directed by the will does not change the character of the thing received by the petitioner.

The executors concededly have not trenched upon the corpus but have turned over nothing but income of the estate. Potentially the whole estate not otherwise specifically disposed of by the will was chargeable with this trust until the trust fund was set apart as required by the will. The testator did not provide for a large legacy payable in fractions out of the corpus of the estate but he treated it as income and separately disposed of the corpus of the fund out of which it was to be paid, to take effect at the death or remarriage of petitioner. It is unnecessary for us to decide whether the petitioner will ever get anything from this estate or trust which is not income to the estate or trust. It affirmatively appears that the payments now in question were income of the estate or trust. These payments not being within the "legacy" exemption of the Income Tax Law but income, according to common understanding and judicial definition, are taxable under the act. Moreover, the mere fact that the intangible interest of petitioner was described as an "annuity" and its capitalized value was fixed for inheritance tax purposes in 1911, the tax upon which was paid by the petitioner, does not make these annual payments exempt from income tax. This worked no change in the real character of the payments and the State is not estopped.

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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929. 30

No. 129

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Petitioner.

against

SYBIL WHITEHOUSE,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement.

By the Tenth Clause of the will of James Gordon Bennett who died May 14, 1918, Sybil Whitehouse was bequeathed a specific annuity of $5,000 (R. 44). The will did not direct or require the payment of the annuity out of income. It authorized the executors to sell, assign, convey, transfer, lease, mortgage or exchange any real or personal property left by the decedent or which might thereafter be acquired by the estate for the purpose of paying any legacy or legacies or for the payment of any annuity or annuities (R. 48). It further authorized, but did not require, the executors to retain and hold any personal property of which the testator died seised and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity

given by him (R. 48). Prior to the year 1921 this annuity was paid out of corpus and no tax was asserted by the Government. During the year 1921 the executors paid the annuity out of income (R. 20-21). The testator provided for the formation as soon as practicable of a charitable corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists", the purpose of which was to provide a comfortable home or necessary pecuniary aid for persons employed by newspapers in the Borough of Manhattan, City of New York, who might be in need of such home or aid (R. 45). He bequeathed and devised the entire residue of his estate to the corporation (R. 48). The corporation was organized in May, 1919 (R. 41).

The petitioner, for the year 1921, asserted that the annuity of $5,000 paid to the respondent was taxable income, and an appeal from that determination was taken to the Board of Tax Appeals. The decision of the Board of Tax Appeals was favorable to the tax payer, whereupon the Government appealed to the Circuit Court of Appeals for the First Circuit which affirmed the Board of Tax Appeals and the Government then filed this petition for a writ of certiorari.

Opinions Below and Statutes Involved.

Citations of the findings of fact, the opinion of the Board of Tax Appeals and the opinion of the Circuit Court of Appeals are contained in the Government's brief. The pertinent statutes involved are likewise set out in the Government's brief, and, for the sake of brevity, are not here repeated.

ARGUMENT.

I.

The Government confuses the nature of the bequest and the source of its payment in 1921.

Both the Circuit Court of Appeals and the Board of Tax Appeals, after a thorough consideration of the authorities, held that the annuity in question was a bequest which constitutes a charge upon the corpus of the entire net estate of the decedent; that it was not a bequest of income such as was involved in *Irwin* v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598; but was a bequest of a specific annual sum payable in any event during the life of the annuitant and, therefore, is excluded from gross income by Section 213(b)(3) of the 1921 Act.

The Government has not, either in its brief in support of its petition, nor in its briefs and arguments below, contended that the annuity is not a bequest or that it is a bequest of income. In fact, its statement of the "Question Presented" (Petition, p. 1) concedes that the payment of the annuity was "under a will which does not direct it to be paid out of income". Its sole argument, reduced to its essentials, is that because the annuity was paid out of income in 1921 it was therefore necessarily income taxable to the annuitant. We assert that the fund out of which the payment happened to be made did not determine its character in the hands of the legatee. Its character was determined by the terms of the will and the law of New York. Its payment out of income in 1921 was merely a coincidence as observed by the Circuit Court of Appeals and was also done as a matter of convenience and expediency but in no way affected the question of taxability in the hands of the recipient. The Government obviously has confused the character of the payment and its source. On the Government's argument a simple legacy

of $5,000, which is unquestionably exempted by Section 213(b)(3), would be income to the legatee if the executor should happen to have income available from which to pay it, and paid it out of such income.

The Circuit Court of Appeals and the Board of Tax Appeals recognized the distinction between the character of this legacy and the fund from which it might be paid and so refused to adopt the Government's fallacy.

II.

Section 219 of the Revenue Act of 1921 does not support the Government's argument.

Subdivision (a) of Section 219 provides that the income tax shall apply to the income of estates including income which is to be distributed periodically. Subdivision (c) of that Section provides that the executor shall pay the tax upon the net income of the estate, but that in computing the net all income which is to be distributed periodically may be deducted by the executor in his return. And subdivision (d) provides that income which is to be distributed periodically and deducted by the executor shall be taxed to the distributee.

The Government assumes the entire case on page 10 of its brief and asserts that a payment of this annuity out of income "is of course a periodic distribution" of income, and erroneously concludes that if the income is not taxed to the annuitant then it will escape taxation. This argument ignores the essential point in the case, namely, that each $5,000 as and when received by the annuitant is in no sense income but is a specific bequest of a sum certain payable without contingency irrespective of whether or not the executor has income. Under such an argument it would follow that if a specific legacy of $5,000 were paid out of funds which are income to the executor, the legatee must pay tax on

the funds received by him. But the executor and the legatee (in this case the annuitant) are two distinct taxable entities under the law. Regardless of whether the funds paid over are or are not income to the executor, the controlling fact persists that any and all payments made to the annuitant constitute a charge on capital, as in the case of an ordinary legatee. Since they are a charge on capital, the executors may claim no deduction as an offset against current income in respect of these payments. Section 219 in providing that income distributed periodically may be deducted by the executor, obviously contemplates income which is taxable to the recipient, for the reason for the deduction is to relieve the executor of tax only when a tax is collected from the recipient and thus avoid taxing the same income twice. This is in harmony with Section 213(b)(3) whereas the Government's construction not only conflicts with that section but also results in the taxation of receipts which are not income in any sense. In this case all of the estate, including the income therefrom, must be held for the Home corporation, subject to the payment of this and other annuities. The Home is exempt by law as a charity. Therefore, failure to collect a tax from this annuitant will not result in any loss of revenue to which the Government would otherwise have been entitled.

III.

Irwin v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598, are distinguishable.

In those cases payments were directed to be made from income of trust funds and were limited to such income. In this case there is no trust fund and no gift of income as such; the annuity is a charge against principal and must be paid in any event, the executors being given power to sell corpus for its payment.

IV.

There is no question involved justifying the granting of a writ of certiorari.

We have been unable to discover any case similar to this pending anywhere except that there are cases of other annuitants under this particular will which are identical with the instant case. The decisions below did not erroneously construe the statute, they are not in conflict with any decisions of this Court, and no Federal question of general importance is presented. They properly construed the will under the laws of New York in giving effect to its provisions.

CONCLUSION.

Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, N. Y.,
June 25, 1930.

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IN THE

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OCTOBER TERM, 1930.

No. 129.

DAVID BURNET, Commissioner of Internal Revenue,
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against

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BRIEF ON BEHALF OF RESPONDENT.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930—No. 129.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

against

SYBIL WHITEHOUSE,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

Statement of the Case.

This case originated as an appeal by the respondent to the United States Board of Tax Appeals from a determination by the Commissioner of Internal Revenue of a deficiency in her Federal income taxes for the calendar year 1921 in the amount of $920.79 (R. 3). The Board found that no deficiency existed (R. 27) and the Commissioner appealed from that decision to the Circuit Court of Appeals for the First Circuit (R. 22). The Circuit Court affirmed the decision of the Board (R. 42). The case comes before this Court on a writ of certiorari issued in accordance with the order entered on October 13, 1930 (R. 42), granting the petition that had been filed on May 17, 1930.

Statement of Facts.

James Gordon Bennett, a citizen of the United States and a resident of New York State, died testate in France on May 24, 1918 (R. 10). In his will he bequeathed annuities to a

number of individuals, including the respondent. The terms of the will relating to the respondent's annuity are as follows (R. 10, 29):

> "Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars.
>
> • • • • • • • •
>
> All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semi-annual payments, reckoning from the time of my death."

The will did not in terms direct whether the annuities should be paid out of principal or income.

The executors were authorized and empowered in their discretion to sell, mortgage, lease or exchange any real or personal property of the testator's estate for the purpose of paying any legacies, debts or annuities. They were also authorized and empowered to retain and hold any personal property of the estate to provide for the payment and satisfaction of any annuity given by him (R. 13, 32).

In the 29th paragraph of his will the testator directed the executors "as soon as practicable" after his death "and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them", to cause to be incorporated a charitable institution to be named "The James Gordon Bennett Memorial Home for New York Journalists" as a perpetual memorial to his father, the founder of the New York Herald (R. 11, 30). The objects and purposes of this corporation were to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who had been employed by newspapers regularly published in the Borough of Manhattan, in the City of New York, and who were in need of such assistance (R. 11, 30). The testator devised and bequeathed the entire residue of his estate to the corporation to be formed "when and as soon as the same shall be duly incorporated" (R. 12, 31). All of the income of the residuary estate accruing during the interval between the testator's death and the incorporation of the Home, the

testator bequeathed absolutely to his friends Eugene Higgins, Rodman Wanamaker and James Stillman, and to such of them as should survive him (R. 12, 31). These individuals were also named as executors.

The James Gordon Bennett Memorial Home for New York Journalists Corporation was organized under the laws of New York in May, 1919 (R. 27). As shown by their account of settlement, on December 30, 1920 the executors permanently set aside to the Home Corporation the residuary legatee and devisee, securities valued at $3,133,260, which, however, remained subject to the payment of taxes, annuities or any other charges (R. 14).

The respondent's annuity and other annuities were paid by the executors out of the corpus of the estate until November 14, 1920. On and after that date they were paid out of the income of the estate (R. 13). The Government did not undertake to tax the annuities in the years when they were paid out of corpus.

The Question Presented.

The question presented is whether or not the annuity payments made to the respondent in 1921 constitute taxable income to her under the Revenue Act of 1921.

The Statutes Involved.

The statutes involved are set out in the Appendix (*post*, pp. 30-33).

Summary of Argument.

I. Under the terms of the will the respondent had no right to receive income as such; she had the right to receive the sum of $5,000 per year in semi-annual instalments, no more and no less, payable in any event, which constituted a charge upon the residuary estate of the decedent. *Ex parte McComb*, 4 Bradf. 151; *Pierrepont* v. *Edwards*, 25 N. Y.

128; *Kearney* v. *Cruikshank*, 117 N. Y. 95, 100; *Clark* v. *Clark*, 147 N. Y. 639; *Buchanan* v. *Little*, 154 N. Y. 147; *Peoples Trust Co.* v. *Flynn*, 188 N. Y. 385; *Peck* v. *Kinney* (C. C. A. 2nd), 143 Fed. 76, 80; *Matter of Toms*, 84 Misc. 312, 318; *Matter of Hodges*, 128 Misc. 211, 213. The respondent did not receive a bequest of income or income from a bequest such as this Court considered in the cases of *Irwin* v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598. The annuity payments were not payments of income produced by a fund or corpus set aside in trust for her benefit pursuant to the testator's direction. No trust was contemplated by the will, none was set up by the executors, and under the law of New York the creation of a trust would not have been permitted. *Clark* v. *Clark*, 147 N. Y. 639. The annuity payments of $5,000 per year are in all material respects indistinguishable from payments on account of a general legacy of a sum certain. *Ex parte McComb*, 4 Bradf. 151, 153; *Matter of Hodges*, 128 Misc. 211, 213; *Reid* v. *Brown*, 54 Misc. 481; *Matter of Cole*, 174 App. Div. 534, aff'd 219 N. Y. 435; *Bertuch's Will*, 225 App. Div. 773.

II. The payments received by the respondent in 1921 are clearly excluded from gross income by the provision of Section 213(b) (3) of the Revenue Act of 1921, which excludes the "value of property acquired by gift, bequest, devise or descent". Section 213(b) is not a provision for exemption to be strictly construed against the taxpayer. *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189; *United States* v. *Merriam*, 263 U. S. 179, 188. It merely defines what is not taxable income and should be construed liberally, in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151.

Section 219 of the Act of 1921 neither permits nor requires the taxation of this bequest to the annuitant merely because the executor paid the installments due in 1921 out of income that had come into his hands. Section 219 requires an executor to report and pay the tax upon income received by

him but permits him to deduct, in computing the net taxable income of the estate, "the amount of any income properly paid or credited to any legatee" and in such case requires that there shall be taxed to the legatee the income of the estate so deducted "which, pursuant to the instrument or order governing distribution" is distributed to the legatee. The amount so deductible by the executor and taxable to the legatee of necessity includes only income paid pursuant to provisions of the will requiring the payment of income as such. Otherwise, the payment of any general legacy out of income would result in the taxation of such legacies as income to the beneficiary and would nullify Section 213(b)(3) in many cases. *Heywood* v. *Commissioner*, 11 B. T. A. 29; *Tyler* v. *Commissioner*, 9 B. T. A. 255. Yet the Government argues here, contrary to its position in those cases, that a payment to a legatee is income to him merely because it was made out of the income of the estate.

The exclusion of these annuity payments from taxable income in the hands of the annuitants does not result in the escape from taxation of income intended by Congress to be taxed. As the Board of Tax Appeals held in the *Heywood* and *Tyler* cases, *supra*, the executor, in the return filed for the estate, is not entitled under Section 219 to deduct these payments, although made from income, because they were not distributions of income *as income* under the terms of the will. The sums so paid would have been taxable to the executor were it not for the fact that they happened to be paid from income derived from the securities which had been permanently set aside for the Home, which is an exempt organization under Section 231 (6) of the Revenue Act of 1921. That income is tax free not because the respondent is not subject to taxation on the annuity payments, but because Congress has exempted from taxation the income of charitable corporations. *United States* v. *Bolster* (C. C. A. 1st), 26 F. (2d) 760, 763.

III. The taxation of the annuity payments to the respondent under Section 219 would result in the imposition of an income

tax as well as an estate tax on their value, for the value of this and other annuities was necessarily included in the computation of that part of the estate not bequeathed to charity which was subject to the estate tax provisions of the Revenue Act of 1916. *Edwards* v. *Slocum*, 287 Fed. 651; aff'd, 264 U. S. 61. Such double taxation is not to be presumed in the absence of a clearly expressed intention of Congress to that end. *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 195.

ARGUMENT.

I.

The respondent's annuity is neither income from a bequest nor a bequest of income; it is an unqualified right in the nature of a general legacy to receive $5,000 a year out of the residuary estate secured by a lien thereon; it is not a right to receive income as such.

The testator died a resident of New York (R. 10) and the law of New York State therefore governs the construction of his will and the rights acquired thereunder. *Harrison* v. *Nixon*, 9 Peters 483, 504. It is elementary that the rights of the object of a testator's bounty are to be determined in accordance with the intention of the testator, as indicated by the provisions of his will, read as a whole. *Colton* v. *Colton*, 127 U. S. 300, 310; *Chrystie* v. *Phyfe*, 19 N. Y. 344, 348; *Herzog* v. *Title Guarantee & Trust Co.*, 177 N. Y. 86, 92.

By the tenth paragraph of his will the testator bequeathed to the respondent "an annuity of five thousand dollars"—an unqualified right to receive $5000 per annum—"in equal semi-annual payments, reckoning from the time of my death" (R. 10). He gave to his executors, for the purpose of carrying out the administration of his estate, the power to sell, mortgage, lease or exchange any and all property of his estate (R. 13). He recognized, however, that

the annuities would constitute a charge or lien upon the assets of his estate and, in order to complete the executors' power of sale he therefore directed that "any and all property so sold, conveyed, assigned, mortgaged, leased or exchanged shall be free from any lien or charge by reason of any devise, bequest or annuity". He further authorized the executors "to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me".

It is to be observed that the testator did not direct that the respondent's annuity or any other annuity be paid out of the income of the estate. Nor did he direct that a trust be set up, the income of which was to be applied to the payment of the annuities. He did not give to the respondent or to any other annuitant an interest in any specific property of the estate, nor did he give to any of them the right to receive the income derived from any specific property of the estate. He did give to each annuitant the right to receive a sum certain, payable semi-annually for life, but the rights of the annuitants are not traceable to any particular property or income. They constitute a general charge or lien upon the corpus of the estate. *Clark* v. *Clark*, 147 N. Y. 639; *Buchanan* v. *Little*, 154 N. Y. 152; *People's Trust Company* v. *Flynn*, 188 N. Y. 385.

The testator did not intend that the respondent's annuity or any other annuity be paid primarily out of the income of the estate. On the contrary, his bequest to the executors of the entire income of the residuary estate during the interval between his death and the incorporation of the Home (R. 31), clearly shows that it was his intention that the income of his estate be applied primarily to uses other than the payment of the annuities. The annuitants were sufficiently secured by their general charge on the corpus and the testator undoubtedly intended that upon the incorporation of the Home the income be applied, so far as was necessary, to defray the expenses of its operation. At page 13 of its brief the Government says that it was undoubtedly

the intention of the testator that the respondent's annuity be paid from income "for the reason that he made a complete disposition of the corpus of his estate by the provision for establishing a charitable corporation". This statement is plainly inaccurate, for the testator in the 29th paragraph of his will bequeathed to the Home not the *corpus* of his estate, but the *residue*, and there is nothing in that paragraph nor in any other provision of the will which could fairly be said to support the assertion that he intended that the annuities be paid out of income.

The cases cited at pages 13 and 14 of the Government's brief to support the general proposition that annuities are payable primarily out of income were all cases wherein the court found by construction of the will that the testator intended that the annuities be so paid. *Delaney* v. *Van Aulen*, 84 N. Y. 16; *Matter of Kohler*, 193 App. Div. 8; *Cummings* v. *Cummings*, 146 Mass. 501. Unlike the wills before the courts in those cases, the will in the case at bar is not only not susceptible of a construction that the annuities be paid primarily out of income, but it clearly shows that the testator intended that the income be applied to other uses.

The annuitants had no right to demand that their annuities be paid out of income, nor were they limited to income for such payment. In point of fact the annuities were paid out of corpus until November 14, 1920 (R. 13). The payments made out of income thereafter, were so made, we infer, because there was sufficient income available after the payment of the expenses of operating the Home, and because it is customary in the administration of an estate to pay current obligations out of income to the extent that it is available. While we do not question the propriety of the annuity payments after November 14, 1920, we submit that the respondent under the terms of the will had no greater right to demand that her annuity be paid out of the income of the estate than an ordinary creditor, either of the testator or of the estate itself. She plainly was given no right to receive income as such under the will and whether the executors chose to pay her annuity out of income

or principal, that fact did not concern her, nor did it alter her rights in any way.

The action of the executors in setting aside, in 1920, the assets in their hands as the property of the Home Corporation, but retaining the control over such assets as security for the payment of the annuities and other obligations, did not create any trust, nor any new rights in the annuitants, nor did it deprive them of any rights which they already had. In pursuance of the testator's direction those assets were permanently set aside for the benefit of the residuary legatee, and the lien securing the payment of the annuities, as well as the obligation to pay them out of the assets of the estate, remained unchanged. The provisions of the will completely negative any intention that a trust be created to secure the payment of the annuities; no trust was actually created, and none was necessary. Indeed, if the executors had attempted to create a trust of the residuary estate to produce income with which to pay the annuities, the Home Corporation could have prevented such action. (See *Clark* v. *Clark*, 147 N. Y. 639.)

It is suggested in the Government's brief at page 21 that the period of administration may have ended prior to 1921, no doubt for the purpose of implying that a trust existed in 1921. There is no warrant whatever for the suggestion or implication. On the contrary, it is elementary that the period of administration continues until all legacies, including annuities, are paid, and throughout such period the executor continues to function as executor. As was said in *Clark* v. *Clark*, *supra* (p. 644):

> "* * * All that we find is a legacy of an annuity and a duty of paying it imposed upon executors, a duty which they were perfectly able to perform by force of their official character, as they were situated when the will took effect. As there was no need to arm them with any additional power emanating from the testator, so none was created, and they were left as executors to pay the annuity to the legatee. That legatee of course took no life estate in the property held by the executors,

as the appellant further contends, but simply held the right to be paid the annuity out of the assets in their hands."

Furthermore, the elements of an express trust, namely, a trustee, an estate bequeathed or devised to him, and a beneficiary, do not exist in the instant case. See *Greene* v. *Greene*, 125 N. Y. 507, 510. None of the cases cited by the Government at page 21 of its brief support the assertion that a trust existed in the case at bar. In fact, *Matter of Slocum*, 169 N. Y. 153, there cited, plainly holds that where, as here, the testator did not direct that the estate be divided into separate funds or trusts, the executors cannot be regarded as true trustees and are not entitled to double commissions.

At pages 18 and 19 of its brief the Government suggests that in the year 1921 the annuities were paid from a particular fund established for that particular purpose. There is no support in the record for such an assertion. While it is true that the assets which were set aside to the Home Corporation in 1920 were subject to the charge of the annuities, those assets had not been specifically appropriated by the executors for the purpose of producing income with which to pay the annuities to the exclusion of the other obligations of the estate. The income of those securities might be applied by the executors for the purposes of the Home Corporation or for the purpose of paying taxes or any other obligation of the estate. With respect to that income the annuitants had no preferential right over any other legatees or creditors of the estate.

Again at pages 9 and 12 the Government asserts that the residuary estate was large enough to produce income sufficient to satisfy the total annuity payments required by the will. That may or may not be true, but in any event it is immaterial, for the executors were under no duty to apply the income of the residuary estate in the first instance to the payment of the annuities. The assets of the residuary estate, which the executors set aside and held for the Home Corpo-

ration in 1920, were the property of the Home Corporation, subject only to the charge of the annuities and the other obligations of the estate. Certainly the taxability of testamentary annuities does not turn upon the fortuitous circumstance of whether the amount of the annuities bequeathed happens to be larger or smaller than the amount of the income of the estate not otherwise used in any particular year. As the Court below said (R. 40):

> "In administering this testator's estate the first year's income went to his executors; consequently the annuities were properly paid from the corpus of the estate. Then the home was organized, but presumably had few occupants, so that income remained available for at least a large part of the annuities. But if the residue set aside for the home, subject to the annuities, etc., had proved non-income-producing, or if the executors had applied all income received to the use of the home, the corpus of the residue would have had to be charged with the payment of the annuities. It follows that the actual payment of the appellee's annuity from income was merely an incident, probably temporary, of the administration of the estate; it might also be called an accident."

The annuity bequeathed to the respondent herein is not income. It is a right in the nature of a general legacy to receive out of the residuary estate $5000 a year in semi-annual instalments, no more and no less, without regard to whether or not the estate produces income. And corelatively, from the standpoint of the executor, it is an obligation charged upon the residuary estate, to pay to the respondent $5000 a year, in any event, out of the residuary estate. *Ex parte McComb*, 4 Bradf. 151; *Pierrepont* v. *Edwards*, 25 N. Y. 128, 131, *Clark* v. *Clark*, 147 N. Y. 639; *Buchanan* v. *Little*, 154 N. Y. 147; *People's Trust Co.* v. *Flynn*, 188 N. Y. 385; *Peck* v. *Kinney* (C. C. A. 2nd), 143 Fed. 76, 80; *Matter of Toms*, 84 Misc. 312, 318; *Matter of Hodges*, 128 Misc. 211, 213.

In *Ex parte McComb, supra*, the Court said at page 153:

> "Now an annuity of five hundred dollars per annum is nothing more than a legacy of five hundred dollars to be paid at the end of one year, five hundred at the end of the second year, and so on. I can see no greater or better reason for charging such a legacy with taxes and commissions, than a legacy of ten thousand dollars payable at the end of a year."

Sometimes the term "annuity" is loosely used to include (1) purchased annuities, (2) payments from the income of a fund set apart and invested for that purpose, and (3) true testamentary annuities payable in any event and constituting a charge upon the whole estate. With purchased annuities we are not concerned except for purposes of illustration. So-called annuities of the second class mentioned are not true annuities. One who is given merely the income from a fund to be set aside and invested is always limited to the income from such fund and may not go upon corpus for the satisfaction of any payments. Such a beneficiary has a life or terminable interest in the corpus, the earnings of which are *distributable* to him *as income*. The respondent's annuity in the case at bar is not of that character, but falls within the third class, namely, true testamentary annuities. It is clear that such annuities constitute a charge upon the entire estate and that the annuitant does not take a life interest or other terminable interest in any specific property of the estate with the right to the income therefrom. As the Court said in *Matter of Toms*, 84 Misc. 312, 318:

> "Annuities like the one created by this will are simply bequests of certain specific sums payable periodically. They do not possess any of the elements of a trust. Redf. Surr., § 737a; *Matter of Collins*, 144 N. Y. 522; *Reid* v. *Brown*, 54 Misc. Rep. 483."

In *Matter of Hodges*, 128 Misc. 211, 213, the Court said:

> "In the case of annuities, there is no deviation in the authorities upon the proposition that an annuity is not

the income from a fund, but that it is a simple general legacy of a certain and determined sum of money, payable annually, or as the will may direct, and if a fund is established for the payment of the annuity out of the income thereof the balance of the annuity must be made up from other property."

The distinction between a bequest of income and a bequest of an annuity is clearly defined in the authorities collected in *Matter of Gurnee*, 84 Misc. 324, 326:

"Page on Wills (§607) defines an annuity as follows: 'An annuity is a right to the payment of a specified sum of money at stated intervals, usually annually or at aliquot parts of a year.'

Remsen, in his book on the Preparation and Contest of Wills (at p. 145), says: 'An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.'

The distinction between an annuity and a life tenancy of income is well shown in the case of *Matter of Dewey*, 153 N. Y. 63. 'The bequest to the widow is of the interest upon the sum of $12,000 to be paid to her annually during the period of her natural life. Does the word "interest" mean an annuity or does it mean income? Redfield on the Law of Wills (Part 2, 453, Edition of 1866) says: "It seems to be well settled in the American courts that as a general thing the bequest of the interest on a particular sum will not be construed the same as giving an annuity of the same amount, although payable annually; but it will be regarded simply as the gift of the income or interest of that amount."' See also *Whitson* v. *Whitson*, 53 N. Y. 479.

There is a distinction between income and an annuity. The former embraces only the net profits, after deducting all necessary expenses and charges. The latter is a fixed amount, directed to be paid absolutely and without contingency. *Carr* v. *Bennett*, 3 Dem. 433-442; *Matter of McComb*, 4 Bradf. 151, 152.

> "An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable; and hence, where testator gave a beneficiary the interest upon a certain sum, payable annually, it is not an annuity, but merely an ordinary legacy, for it is not a stated sum, but may be more or less, according to the earnings of the capital, and is merely interest or income. *Booth* v. *Ammerman*, 4 Bradf. 129-133."

This fundamental distinction between a bequest of income as such and a bequest of an annuity, the Government concedes. At page 18 of its brief it says: "It is true that a bequest of income from a particular fund is payable only from income, whereas an annuity is payable in all events, whether there be sufficient income or not, and in that sense is a charge on the corpus of the estate." It then goes on to say, however, that this distinction is one of form rather than substance and should be disregarded. But obviously, the distinction between a right to income as such and a right to a sum certain payable in any event is not formal, nor is it superficial, for it goes to the substantive nature of the recipient's right, and in the last analysis the nature of that right is determinative of the question whether the payments received are income or something else.

The Government further says, at page 18, that "in substance there is no difference between payments which in fact are income, whether required to be paid as such or not". The assertion that the payments in question "in fact are income", if it has any basis at all, must be predicated either upon the fact that the payments are periodic or upon the proposition that a payment is income to the recipient if it is made out of income. No doubt it is either or both of these supposed tests that the Government has in mind when it says at page 13 of its brief that "irrespective of how the local law may regard an annuity, the Revenue Acts have their own criteria that look to certain rather severe tests of liability and exemption".

We earnestly submit that both of these proposed tests are fundamentally unsound. It is obvious that the recipient of a payment does not realize income merely because the payment was made out of the income of the payor. For example, if A repays money borrowed from B from his income, B does not realize income upon the repayment merely because A paid it from his income. Conversely, if A pays a salary to his employee out of capital, the fact that A's capital was depleted by the payment does not prevent the employee from receiving income by way of compensation for services. In short, there is no necessary relation between the source of a payment and its taxability in the hands of a payee; and funds cannot be earmarked as income or capital at their source either for the purpose of permitting the recipient to escape a tax or for the purpose of permitting the Government to impose a tax.

Nor does the mere fact that the payments to the respondent are to be made periodically at semi-annual intervals make them income. If A owes B $10,000 and agrees to repay B $1,000 a year until the obligation is satisfied, B may or may not realize income upon the receipt of those payments, depending upon the nature of his claim. If it is a claim for the repayment of borrowed money, his receipts are not income; but if it is a claim for services, his receipts are income. The mere fact that payment of A's obligation is made in instalments rather than in a lump sum does not change the character of the moneys received by B for the purposes of taxation. In the case at bar the executors have the power to commute the annuities by paying to each annuitant a lump sum representing the present value of each annuity computed by reference to mortality tables. *Buchanan* v. *Little*, 154 N. Y. 147, 152; *People's Trust Co.* v. *Flynn*, 188 N. Y. 385, 393. And the annuitants had the right to demand the payment of such value in a lump sum. *Reid* v. *Brown*, 54 Misc. 481; *Matter of Cole*, 174 App. Div. 534, aff'd 219 N. Y. 435; *Bertuch's Will*, 225 App. Div. 773. If the respondent's annuity had been paid to her in a lump

sum, that sum would not have been taxable to her any more than any other general legacy would be taxable to her.

The Government's position leads inevitably to the rather unique conclusion that a testamentary annuity, such as the one at bar, may be partly taxable and partly nontaxable in the same year, or may be taxable in one year and not taxable in another year, depending upon whether the payments were made out of the income of the estate or out of the corpus of the estate. This is well illustrated by the case of another annuitant under this will, *Appeal of Isaac Bell*, now pending before the Board of Tax Appeals, wherein for the year 1922 Bell's annuity of $30,000 was paid partly out of income and partly out of corpus and the tax was asserted against him on account of the annuity only to the extent that it was paid out of income. If the Government is right, then in the instant case, where the income of the estate may be used for the purposes of the Home, the taxability or non-taxability of the payments to the respondent will depend upon the number of indigent newspapermen who are in need of assistance and who are given assistance by the Home in any particular year.

The Government was not compelled to take so tenuous a position in *Irwin* v. *Gavit*, 268 U. S. 161 and in *Heiner* v. *Beatty*, 17 Fed. (2d) 743, affirmed *per curiam*, 276 U. S. 598. Both of those cases involved trusts created under specific direction of the testator. The income flowing from the corpus of those trusts and paid over to the beneficiaries as income each year was either wholly taxable to the recipient, or else income intended by Congress to be taxed would entirely escape taxation. That is not true here. (See *post*, pp. 25-27.) As the Court below said (R. 41):

> "But in the instant case we are dealing with a bequest of a sum certain, payable during the life of the legatee, from the corpus of the estate, unless of course income be available for such payment, as pending development of needs of the home there was. How long such income will be thus available is entirely uncertain. It would seem anomalous to tax such annuities as income of the

> recipient one year and not permanently. Apparently the Government made no attempt to tax them for the two years when actually paid from the corpus of the estate."

The Government has not always maintained that a payment is income if made out of income, nor that payments are income if made in instalments rather than in a lump sum. In two cases before the Board of Tax Appeals it maintained that under the Revenue Acts of 1918 and 1921 an executor who, during the period of administration, makes payments out of the income of the estate to general legatees on account of their legacies, may not deduct such payments from gross income in the return of the estate, and the Board so held. *Heywood* v. *Commissioner*, 11 B. T. A. 29; *Tyler v. Commisioner*, 9 B. T. A. 255. It follows from these decisions that the legatees are not taxable on the moneys that were paid to them out of the income of the estate, for the Revenue Acts do not impose a tax upon the recipient of payments out of income of an estate except in cases where the payment is deductible by the executor in the return of the estate. The decisions in the *Tyler* and *Heywood* cases sustaining the Government are undoubtedly sound, for the Board recognized that a payment is not taxable to the recipient merely because it was made out of income, and it also recognized that a payment out of the income of an estate to a legatee on account of his legacy is not income to the legatee. As a legatee under the will of James Gordon Bennett the respondent is in precisely the same position as the legatees in the *Tyler* and *Heywood* cases.

II.

The annuity payments to the respondent constitute property acquired by gift or bequest within the meaning of Section 213(b) (3) of the Revenue Act of 1921; they do not constitute taxable income to her within the meaning of Section 219(d) of the Revenue Act of 1921.

Section 213(a) of the Revenue Act of 1921 defines in all inclusive terms what constitutes gross income. Section 213(b) then provides:

> "That for the purposes of this title * * * the term 'gross income'—
>
> * * * * * * *
>
> "Does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * * * *
>
> "(3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income)."

Undoubtedly the words "gift" and "bequest" as used in Section 213(b) include a testamentary annuity such as the annuity of the respondent in the case at bar. See *United States* v. *Merriam*, 263 U. S. 179, 184. The decisions of this Court in *Irwin* v. *Gavit*, *supra*, and *Beatty* v. *Heiner*, *supra*, have established that the term "bequest" in Section 213(b) does not include either a bequest of income or income from a bequest. As we have pointed out, the respondent, under a proper construction of the testator's will and under the law of New York, does not take either a bequest of income or income from a bequest; what she takes is a general legacy of $5000 a year charged upon and payable out of the residuary estate as a whole, with no preferential right to either income or principal. If, instead of giving her an annuity

of $5000 a year the testator had given her a legacy of $50,000, obviously the $50,000, when received by the legatee would not be taxable to her even if it had been paid in instalments and entirely out of the income of the estate. *Heywood* v. *Commissioner*, 11 B. T. A. 29; *Tyler* v. *Commissioner*, 9 B. T. A. 255. Or if her annuity were commuted by the payment of a lump sum, such sum would not be taxable income to her, regardless of the source from which it was paid. The fact that the respondent's legacy is being paid in semi-annual instalments during her life, instead of in a lump sum, does not make it taxable income so long as she was given no right to receive the income flowing from any particular property or fund, but was simply given a right to be paid out of the residuary estate.

In the *Gavit* case the taxpayer, as beneficiary, acquired by bequest a life interest in the specific trust *res* under the trust created at the direction of the testator, and he received the income flowing from that *res*. The bequest in that case was an equitable interest or estate in the corpus of the trust. See *Brown* v. *Fletcher*, 235 U. S. 589, 599. That interest or estate was not taxable as income, but the income arising from it was taxable.

In the *Beatty* case, affirmed *per curiam*, by this Court on the authority of *Irwin* v. *Gavit*, the Circuit Court of Appeals put its decision squarely on the ground that the provisions of the testator's will created "with no lack of certainty, out and out trusts", thus bringing the case within the four corners of the *Gavit* case. Speaking of the provisions in the will, the Circuit Court said (p. 744):

> "They provided a capital sum for each annuitant, directed that it be 'set apart' and 'held in trust' for him and that from the interest and income therefrom accruing payment of a definite sum be made to him semi-annually. Having all the earmarks of formal trusts, the executor and trustee, believing itself charged therewith, exercised the election given it to create capital trust funds by withdrawing from the body of the estate sufficient securities to produce the amounts to be paid annually to the more than forty annuitants."

No such provision appears in the Bennett will and no such action was either authorized or taken by the executors in the case at bar.

Matter of White v. *Gilchrist*, 214 App. Div. 153, cited at page 20 of the Government's brief, is in all essential respects similar to *Irwin* v. *Gavit* and *Beatty* v. *Heiner*. The testator in the *White* case directed that a trust be set up "to earn and produce an annual income of $10,000 which said amount my trustees are directed to annually pay to Mrs. Ida Josephine B. White, in equal quarterly payments" until she should die or remarry. The trustees did not actually set up the trust but paid the $10,000 per annum to Mrs. White out of the income of the estate. The Court held that those payments were taxable to her under the New York income tax law, the provisions of which are similar to the Federal law. The rights of Mrs. White in that case, unlike the rights of the respondent herein, were similar to the rights of the beneficiaries in the *Gavit* and *Heiner* cases, and they were not altered by the failure of the trustees to carry out the testator's direction. Under the will, Mrs. White acquired a right to receive income as such from the date of the testator's death. *Matter of Stanfield*, 135 N. Y. 292, 295. The Court in the *White* case said, at page 155:

> "The mere fact that the executors and trustees have not obeyed the will of the testator by setting apart the trust fund directed by the will does not change the character of the thing received by the petitioner."

We repeat that in the case at bar the will creates no trust, the executors established no trust, the respondent has no right under the will to income as such, and the payments she receives are payments on account of her legacy and are nothing more nor less than property acquired by bequest within the meaning of Section 213(b) (3).

Notwithstanding the use of the word "exempt" in Section 213(b), it is not a provision for exemption to be strictly construed against the taxpayer, as the Government contends

in its brief at page 13. The provision merely defines what is not taxable income, and is to be liberally construed in favor of the taxpayer. *United States* v. *Merriam*, 263 U. S. 179, 188; *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 194. In the *Supplee-Biddle* case, this Court said, at page 194:

> "Nor do we find any difficulty with the expression in paragraph (b) which *exempts* proceeds of life insurance from gross income. The word is used not to indicate that they would be otherwise included in the income to be taxed, but only to make clear that the gross does not include them."

We turn now to Section 219, which is in *pari materia* with Section 213(b) (3) and should be construed together with it. The pertinent provisions of Section 219 appear in its subdivisions (c) and (d). Subdivision (c) provides that in the case of income received by estates of deceased persons during the period of administration,

> "the tax shall be imposed upon the net income of the estate * * * and shall be paid by the fiduciary, except that in determining the net income of the estate * * * there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary."

Subdivision (d) provides that in the case of any income permitted by subdivision (c) to be deducted,

> "the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate * * * for its taxable year which, pursuant to the instrument or order governing the distribution is distributable to such beneficiary, whether distributed or not * * *."

The foregoing provisions express the purpose of the Act to tax decedents' estates as entities separate and distinct from the persons who take under the will or by intestacy. They, however, indicate an exception to this general purpose, namely, to tax to legatees, heirs and beneficiaries, income

which is required by the terms of the will to be distributed to such persons. In respect of such income the personal representative may take a deduction on the return filed for the estate but the person to whom the income is distributable must pay the tax thereon. The only rational construction of Section 219 is that the executor may deduct and the legatee is required to pay tax upon only the amounts of income that are distributed or distributable as income under the terms of the will. No other possible construction suggests itself when these provisions are read in the light of the provisions of Section 213(b)(3) which exclude from taxable income "the value of property acquired by gift, bequest, devise or descent." An income tax cannot be imposed upon a legacy or a sum of money not directed to be paid to the legatee as income without nullifying the provisions of that section. As the Board of Tax Appeals in its opinion below said (R. 20, 21):

> "We have for application sections 213 and 219 of the revenue act of 1921. It is only by a strained construction that we can by any possible means arrive at the conclusion that these annuities are taxable under section 219, to the petitioners, as distributive income. On the other hand, section 213 grants an exemption in cases of bequests. There is no doubt that each of these annuities is a bequest and there is no doubt that none of them is made payable by the will of James Gordon Bennett out of income. To hold that the mere fact that in the taxable years involved, the annuities were paid out of income and therefore were distributive income to the recipients, would give a construction to the taxing statute far beyond the meaning of the words used. When we are compelled to choose between clear words of exemption and a strained construction of a taxing provision, we accept that which is clear rather than that which involves doubt."

Although the Government says that Sections 219 and 213(b)(3) are in *pari materia* and "must necessarily be construed together," the conclusion it reaches with respect to the

construction of Section 219 can only be reached by completely ignoring the provisions of Section 213(b)(3). At page 16 it makes the unqualified statement that "so far as the beneficiary [here, the legatee] is concerned, the test of taxability under this section is whether there is distributable to him net income of an estate or trust." This is a fatally incomplete statement. To it must be added the words "as income". Otherwise the mere employment of income by an executor to pay any charge upon the estate would make the payment income to the payee and a deduction to the executor. For example, a bequest of $10,000 would be income to the legatee if paid from income and Section 213(b) (3) would be rendered meaningless.

It is not uncommon for an executor to pay general legacies out of income which has not been otherwise disposed of under the will. Indeed, in discharging their obligations, it is the practice of executors to exhaust current income before dipping into the corpus. Such income, not otherwise disposed of by the testator, is available for distribution to legatees on account of the principal amount of their legacies, just as the corpus of the estate is available for that purpose. Suppose, for example, that a testator leaves a legacy of $10,000 to A, a legacy of $10,000 to B and the residue of his estate to C, and that before the close of the period of administration the executor, having made provision for the payment of all debts, finds that there is available $5,000 of income which has been earned by the estate since the testator's death. Suppose, further, that the executor pays $5,000 to A and $5,000 to B on account of their legacies, the payment to A being made out of income and the payment to B being made out of corpus. Under the Government's construction of Section 219, A pays an income tax on his $5,000 while B does not. Such a conclusion, we submit, is absurd.

Under a proper construction of Section 219, the tax upon the $5,000 distributed to A would be payable not by A, but by the executor. That is precisely what the Government contended in *Heywood* v. *Commissioner*, 11 B. T. A. 29 and in

Tyler v. *Commissioner*, 9 B. T. A. 255, and the Board of Tax Appeals properly sustained the Government's contention. Neither of those cases was taken up on appeal and presumably the Department is applying the construction therein established in examining the returns of estates.

But where, as here, the Government is dealing with a legatee, it adopts a different construction of Section 219, exacting from the legatee the tax upon the amount paid to him on account of his legacy. In support of this construction the Government, at page 16, cites *Riker* v. *Commissioner* (C. C. A. 2d), 42 F. (2d) 150, a case which is clearly distinguishable from the case at bar.

In the *Riker* case the executor in 1923 made payments out of the income of the estate to a residuary legatee and the Court held that such payments were taxable to the legatee and not deductible by the executor. Although the report does not indicate whether the payments were made prior or subsequent to the expiration of the first year of administration, we have ascertained by an examination of the record in that case that letters testamentary were issued to the executor on October 27, 1921, and that the statutory period of administration of the estate expired on October 27, 1922, prior to the time when the payments in question were made to the residuary legatee. Under the law of New York, which apparently governs the legatee's rights, his right to receive income as such on his legacy arose at the close of the first year of administration. *Matter of Lord*, 134 Misc. 198, affirmed 228 App. Div. 771; *Matter of Benson*, 96 N. Y. 499. In the case at bar the respondent, as an annuitant, has no right to receive income as such.

In the brief filed by the Government in the *Riker* case in the Circuit Court of Appeals, the following is said with reference to the case at bar as decided by the Court below:

> "That case is to be readily distinguished from the instant one. The facts are that an annuity was bequeathed to the taxpayer. During the years in question the annuity was paid out of income, but as expressed by the

court (p. 8319), 'the actual payment of the appellee's annuity from income was merely an incident, probably temporary, of the administration of the estate; it might almost be called an accident.' The court in that case expressly distinguishes it from *Irwin* v. *Gavit*, *supra*, in which the annuity specifically had to be paid from income and not from the corpus. The court rests its decision upon that distinction. Thus, while an annuity payable from the corpus is within the ambit of Section 213 (b) (3) and not subject to tax, one which is payable from income of the estate or trust is considered 'the income from such property' within the terms of the exception to that subdivision of the statute, and consequently subject to tax."

Running through the Government's brief is the suggestion that if the payments in question are not taxed to the respondent, then so much income has escaped taxation. This is not true. When the executor paid these annuities out of income he was not entitled to take a deduction from income of that amount because he did not distribute income as such but merely paid a part of a general bequest. Therefore, all of the income realized by the estate in 1921 was taxable to the executor under Section 219, *unless because of other provisions of the statute it was exempted*. It so happens in this case that all of the estate with its increments, not paid to other legatees is held for the Home Corporation which is an exempt organization under Section 231 (6) (*post*, p. 32) and for that reason the income happens not to be subject to taxation in the hands of the executor. In other words, the income from the securities set apart for the Home is excluded from taxation, not because the respondent and the other annuitants are not subject to taxation on the annuity payments, but solely because Congress under other provisions of the law has seen fit to exempt from taxation the income of charitable organizations.

In *United States* v. *Bolster*, 26 F. (2nd) 760, (C. C. A. 1st) the testator bequeathed to his wife the net income of a trust, in lieu of dower, the trust corpus being permanently

set aside for the benefit of charitable institutions. The Court held that because the wife elected to take the income in lieu of dower she was a purchaser for value and what she received constituted a return of capital, not taxable income. The Government in that case argued, as it does here, that if the wife was not subjected to an income tax on the payments she received, so much income would escape taxation altogether. The Court said (p. 763):

> "In the instant case we do not have to consider the possibility of the government losing its rightful tax upon income which Congress intended should be taxed. It is not a question of a statute 'failing to hit' something which ought to be taxed. Under the statute with which we are dealing a trust is the subject of taxation just as an individual. We think the government must look to the trustee for its tax, and that the trust would clearly be taxable upon this income, if it were not expressly exempted because of its charitable character."

But the Government, apparently recognizing that no income *escapes* taxation in the case at bar because the Home corporation is a charity, goes further, and says at page 22 that "the practical effect of the decision below is to enable income of an estate which arises from non-exempt sources to escape taxation". This is entirely erroneous. As we have pointed out, the Government taxes to the estate all income without allowing any deduction for payments of legacies out of income. *Heywood* v. *Commissioner, supra; Tyler* v. *Commissioner, supra.* Obviously, Section 219 permits the estate to deduct only that income paid over to legatees which is properly taxable to them, and prohibits the deduction otherwise Therefore there is no basis whatever for the assertion that the effect of the decision below is as claimed by the Government.

In *Irwin* v. *Gavit* and *Beatty* v. *Heiner* the funds received by Gavit and Beatty were distributions of income *as income* pursuant to the terms of the wills; the trustees were clearly permitted under Section 219 to deduct the sums so distrib-

uted, and, so far as Section 219 was material in those cases, its effect was to make the payments taxable to the beneficiaries. Consequently, failure to tax the recipients would have resulted in the escape from tax of income when the statute contemplated taxing all income not specifically exempted. On the other hand, in the case at bar, the annuities, not being limited to the income of the estate, but being sums payable in any event and constituting charges on the estate as a whole, are not distributions of income *as income* under the terms of the will, and therefore are neither taxable to the annuitants nor deductible by the estate under Section 219.

III.

The taxation of the respondent's annuity as income would result in double taxation not intended by Congress.

James Gordon Bennett died on May 24, 1918 (R. 10) and there was imposed by Section 201 of the Revenue Act of 1916, as amended by Section 300 of the Revenue Act of 1917, an estate tax based upon the value of his net estate. The value of the net estate, as provided in Section 203 of the Revenue Act of 1916, retroactively amended by Section 403(a) (3) of the Revenue Act of 1918, is the value of the entire estate less certain allowable expenses, a specific exemption and the value of bequests to charitable or other exempt organizations. Where, as in the case at bar, the residuary legatee is a charitable organization, the value of the net taxable estate must be and is in fact determined by ascertaining the value of all of the non-exempt bequests and devises. *Edwards* v. *Slocum*, 287 Fed. 651; affd. 264 U. S. 61. Consequently, the testator having provided for the payment of annuities as a charge upon his entire estate and having bequeathed the residue to a charitable organization, the value of the net taxable estate must be determined by

finding the value of the annuities as of the date of death. It is a matter of common knowledge that the present value of annuities is determined by discounting at a certain rate of discount the present worth of the annual payments over the life expectancy of the annuitant, and such expectancy is determined by the use of mortality tables. We refer to the provisions of Article 15 of Treasury Regulations 63 as illustrating that this method of valuing annuities is used by the Department.

Under the statutes providing for a tax upon the value of the net estate, a tax was imposable upon the value of the anticipated annuity payments. Notwithstanding this, however, the Government proposes to impose in addition an income tax upon the annual payments when they are received. This is double taxation and is not to be permitted unless expressly required by statute. It would indeed be an anomalous situation if the Federal Government, after imposing an estate or inheritance tax on the value of these annual payments as *corpus* passing at death, is permitted to impose also an income tax upon the theory that the payments are not *corpus* but are *income*. *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189; *Nichols* v. *United States*, 64 Ct. Cls. 241; certiorari denied, 277 U. S. 584. Yet, that is precisely what the Government is now attempting to do. Referring to a situation in all respects similar, which arose under the Revenue Act of 1918, this Court in the *Supplee-Biddle* case, at page 195, said:

> "The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above $40,000, i. e., an income tax and an estate tax. Such a duplication even in an exigent war tax measure *is to be avoided unless required by express words.*" (Italics ours.)

In the *Gavit* and *Beatty* cases there was no double taxation. The estate tax did not apply to the income received by Gavit and Beatty, because the tax was imposed only

upon the corpus of the trusts from which their income arose. Here, the estate tax is measured by the value of the anticipated annuity payments and an income tax is sought to be imposed upon the amount of such payments when received.

Respondent argued below that, in any event, no taxable income could be realized by this annuitant until the value of her bequest, which must be excluded from gross income, has been recovered through the annuity payments. This alternative position of the respondent was not considered by the Court below. The Government, at pages 22-24 inclusive, disputes the merit of such an argument by asserting that one who takes an annuity as a volunteer may not be likened to one who has purchased an annuity and by reiterating its fundamental error that respondent's annuity is taxable because it was paid from the income of the estate, again completely ignoring the provisions of Section 213 (b) (3).

CONCLUSION.

In accordance with the foregoing, it is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

The Statutes Involved.

Section 213 of the Revenue Act of 1921 (c. 136, sec. 213, 42 Stat. 237-8) provides in part:

"That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme Court and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whateyer form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income) * * *"

Section 219 of the Revenue Act of 1921 (c. 136, sec. 219, 42 Stat. 246-7) provides in part:

"(a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing the net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

* * * * * * *

Section 231 of the Revenue Act of 1921 (c. 136, sec. 231, 42 Stat. 253) provides in part:

> "That the following organizations shall be exempt from taxation under this title—
>
> * * * * * * * *
>
> (6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; * * *"

Section 201 of the Revenue Act of 1916 (c. 463, sec. 201, 39 Stat. 777) provides in part:

> "That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *"

Section 300 of the Revenue Act of 1917 (c. 159 sec. 300, 39 Stat. 1002) provides in part:

> "That section two hundred and one, Title II, of the Act entitled 'An Act to increase the revenue, and for other purposes,' approved September eighth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:
>
> 'Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in, section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *"

Section 403 of the Revenue Act of 1918 (c. 18, sec. 403, 40 Stat. 1098) provides in part:

"That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * * * * *

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; * * *"

SUPREME COURT OF THE UNITED STATES.

No. 129.—October Term, 1930.

David Burnet, Commissioner of Internal Revenue, Petitioner, *vs.* Sybil Whitehouse. | On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 13, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Revenue Act of 1921, c. 136, 42 Stat. 227, 233, 237, 246, provides—

"Sec. 210. That . . . there shall be levied, collected and paid for each taxable year upon the net income of every individual a normal tax of 8 per centum of the amount of the net income . . .

"Sec. 211. That . . . in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual . . . a surtax . . .

"Sec. 212. (a) That in the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by section 214. . .

"Sec. 213. That for the purposes of this title . . . the term 'gross income'—(a) Includes gains, profits, and income derived . . . (b) Does not include the following items, which shall be exempt from taxation under this title: . . . (3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); . . ."

James Gordon Bennett died May 24, 1918. His will provided for payment of twenty or more annuities. Among other items, it contained the following.

Item "Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

Item "Twenty-eight. . . . . All annuities hereby given shall commence at the time of my death and be payable in equal parts half-yearly, except as hereinabove specifically mentioned."

Item Twenty-nine directed the executors to establish a Memorial Home and to that end gave them the residue of the estate.

Item "Thirtieth. . . . . I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

The annuity for Mrs. Whitehouse was satisfied from the corpus of the estate prior to November 14, 1920; afterwards, out of income derived therefrom. December 30, 1920, the executors permanently set aside for the Memorial Home a large amount of interest-bearing securities "but subject to taxes, annuities, and other charges."

The Commissioner of Internal Revenue demanded of Mrs. Whitehouse income tax for the year 1921 on the semi-annual payments received during that period. She petitioned the Board of Tax Appeals for relief. It held that the bequest to her was within paragraph (b), item (3), Sec. 213, Revenue Act of 1921, and therefore exempt. The Circuit Court of Appeals, First Circuit, approved that conclusion.

The most plausible argument submitted for the Commissioner is this. An annuity given by will is payable primarily out of the income from the estate. The residuary estate of Bennett produced enough during 1921 to meet all bequeathed annuities. The payments received by Mrs. Whitehouse during that year were, in fact, made from such income. Consequently, it cannot be said that the bequest was one of corpus; and the payments were taxable under *Irwin* v. *Gavit*, 268 U. S. 161.

As held below, the bequest to Mrs. Whitehouse was not one to be paid from income but of a sum certain, payable at all events during each year so long as she should live. It would be an anomaly to tax the receipts for one year and exempt them for another simply because executors paid the first from income received and the second out of the corpus. The will directed payment without reference to the existence or absence of income.

Irwin v. *Gavit* is not applicable. The bequest to Gavit was to be paid out of income from a definite fund. If that yielded nothing, he got nothing. This Court concluded that the gift was of money to be derived from income and to be paid and received as income by the donee. Here the gift did not depend upon income but was a charge upon the whole estate during the life of the legatee to be satisfied like any ordinary bequest.

An attempt is made to strengthen the position of the Commissioner by reference to Section 219, Act of 1921, which declares that the tax imposed by Sections 210 and 211 shall apply to the income of estates, including—"Income which is to be distributed to the beneficiaries periodically, . . ." But clearly enough, we think, this section applies only to income paid as such to a beneficiary. And, as above shown, the sums received by Mrs. Whitehouse were not gifts to be derived from and paid out of income, nor were they received as such by her.

The exemption in Section 213 is plain and should not be destroyed by any strained construction of general language found in Section 219.

The judgment of the court below must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.